90-3

No. 90-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CARRIERS CONTAINER COUNCIL, INC.,
Petitioner,

vs.

MOBILE STEAMSHIP ASSOCIATION, INC., INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO PENSION PLAN AND TRUST, *et al.*,
Respondents.

CARRIERS CONTAINER COUNCIL, INC.,
Petitioner,

vs.

MOBILE STEAMSHIP ASSOCIATION, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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130 pp

Questions Presented

1. Did the court of appeals disregard the precedents of this Court by upholding a $20 million grant of summary judgment against Carriers Container Council, Inc. ("CCC") when, having determined that the labor contract (the JSP Agreement) was ambiguous, it refused to reverse the lower court and to remand the case for trial to resolve the ambiguities which raised genuine, disputed issues of material fact?

2. Did the court below err by failing to give deference to the findings of both the U.S. Departments of Labor and Treasury — the agencies entrusted by Congress with administering the Employee Retirement Income Security Act of 1974 ("ERISA") — that CCC could return surplus funds collected under the JSP Agreement to its steamship carrier members without violating the non-reversion provisions of ERISA, since CCC was determined by both agencies not to be an employee benefit plan subject to ERISA?

3. Did the court of appeals misconstrue the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") by holding that CCC was an "employer" liable for withdrawal liability based on amounts paid by CCC under the JSP Agreement to the Mobile Pension Plan, where the JSP Agreement contains an explicit disclaimer of any promise by CCC to provide pension benefits and MPPAA imposes withdrawal liability only where such a promise of benefits is made?

Parties

The full listing of the parties in this case taken from the captions of the pleadings are as follows:

A. Petitioner:

Carriers Container Council, Inc. ("CCC"), successor to JSP Agency, Inc. ("JSPA"). Petitioner CCC has no parent or subsidiary companies. Supreme Court Rule 29.1.

B. Respondents:

1. Mobile Respondents:

Mobile Steamship Association, Inc.; Atlantic & Gulf Stevedores; Cooper/T. Smith Corporation; Murray Stevedoring Company, Inc.; Pate Stevedore Company of Mobile, Inc.; Ryan-Walsh Stevedoring Company, Inc.; Strachan Shipping Company; Local 1410, International Longshoremen's Association, AFL-CIO; Local 1410-1, International Longshoremen's Association, AFL-CIO; Local 1459, International Longshoremen's Association, AFL-CIO; and Local 1985, International Longshoremen's Association, AFL-CIO;

and

F. D. Alspaugh, Arthur W. Stratton, Hartwell Ludlow, Ned Mattingly, Felix Cleveland, Henry L. Clarke, Albert Walton, Jr., and Seymour Irby, in their capacities as Trustees of the MSSA-ILA Pension and Welfare Plans;

and

Rufus B. Lee, John T. Murray, III, Harry Smith, C. H. Pierce, Robert A. Estes, and J. C. Ratcliff, in their capacities as the Trustees of the MSSA-ILA Local 1985 Maintenance Employees' Pension Plan.

2. Philadelphia Respondents:

James Paylor, Thomas Jenkins, Robert Gladden, Joseph Hill, Arthur Wilson, Lucien Blackwell, John McCann, Ralph Arizini, John Kane, Charles Kowalewitz, As Trustees of the PMTA-ILA Pension Fund

and

Elwood Gunther, Joseph S. Kane, Charles Kelly, John Mahoney, William Cullen, Louis Carberry, St. Clair O. Parson, Sr., Thomas P. Kelly, Donald G. Baker, Joseph A. Wilson, as Trustees of the PMTA-ILA Welfare Fund

and

Arthur Wilson, Joseph Hill, Lucien Blackwell, James Paylor, Jr., John Mahoney, Louis Carberry, James Lacey, Thomas Smith, Thomas P. Kelly, Alfred Castagnola and Ralph Arizini, Jr., as Trustees of the PMTA-ILA Supplemental Unemployment Compensation Benefit Fund.

3. Union Respondent:

International Longshoremen's Association, AFL-CIO.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Introduction

This case involves a novel, collectively-bargained response to employee benefit problems in the longshore industry — the JSP Agreement. Two district courts and one court of appeals (the cases were consolidated on appeal) ruled that the parties that negotiated the JSP Agreement — the longshoremen's union and the ocean carriers — misunderstood their own intent.

On the one hand, CCC was held to be akin to an employee benefit plan to which the non-reversion provisions of ERISA were applied (the "surplus case"), entitling its opponents to approximately $20 million. On the other hand, CCC was declared to be an "employer" under MPPAA liable for withdrawal liability (the "withdrawal liability case"), exposing CCC to additional monetary liability. Both conclusions are completely at odds with what the carriers and the union had bargained for in the JSP Agreement.

The lower courts' misinterpretations of the JSP Agreement have had a chilling effect on coastwide longshore labor negotiations now in progress. Management and labor are reluctant to enter into similar labor agreements given the likelihood that a federal district court could arbitrarily rewrite their contract and impose financial penalties in the millions of dollars. Private industry solutions to employee benefit funding problems will be permanently set back, not only on the waterfront but in many other industries nation-wide, unless this Court grants review of these cases.

Opinions Below

The opinion of the court of appeals, which is reported at 896 F.2d 1330 (11th Cir. March 22, 1990), is reproduced as Appendix A (App. A at 1a-29a). The June 22, 1989 opinion and judgment of the district court in the surplus case is reproduced as Appendix B (App. B at 30a-57a) and is unofficially reported at 11 Empl. Ben. Cas. (BNA) 1449 (S.D.Ala. 1989). The March 21, 1989 opinion and judgment of the district court in the withdrawal liability case is reproduced as Appendix C (App. C at 58a-80a). The May 5, 1989 order of the district court in the withdrawal liability case is reproduced as Appendix D (App. D at 81a-85a). The court of appeals' order of June 22, 1990 denying Petitioner CCC's Petition for Rehearing and Suggestion for Rehearing In Banc is reproduced as Appendix E (App. E at 86a-87a). The August 7, 1990 judgment of the Court of Appeals is reproduced as Appendix F (App. F at 88a-90a).

Jurisdiction

The judgment of the court of appeals denying the Petition for Rehearing and Suggestion of Rehearing In Banc was entered

on June 22, 1990. This petition is being filed within 90 days of that date. Supreme Court Rule 13.4. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1) (West Supp. 1990).

Statutes

The relevant statutes are as follows

1. **Federal Rule of Civil Procedure 56(c):**

"Rule 56. Summary Judgment

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

2. **Sections 403(a) and (c)(1) of ERISA, 29 U.S.C.A. §§ 1103(a) & (c)(1) (West 1985):**

"§ 1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees.

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees

* * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

3. Section 1051(a) of ERISA, 88 Stat. 951, *codified at* 26 U.S.C.A. § 7802(b) (West 1989):

"Act Sec. 1051. Establishment of Office

(a) In General — Section 7802 (relating to Commissioner of Internal Revenue) amended to read as follows:

SEC. 7802. COMMISSIONER OF INTERNAL REVENUE: ASSISTANT COMMISSIONER (EMPLOYEE PLANS AND EXEMPT ORGANIZATIONS).

* * *

(b) ASSISTANT COMMISSIONER FOR EMPLOYEE PLANS AND EXEMPT ORGANIZATIONS. —

There is established within the Internal Revenue Service an office to be known as the 'Office of Employee Plans and Exempt Organizations' to be under the supervision and direction of an Assistant Commissioner of Internal Revenue. As head of the Office, the Assistant Commissioner shall be responsible for carrying out such functions as the Secretary or his delegate may prescribe with respect to organizations exempt from tax under section 501(a) and with respect to plans to which part I of subchapter D of chapter

1 applies (and with respect to organizations designed to be exempt under such section and plans designed to be plans to which such part applies)."

4. Section 4201(a) of ERISA, 29 U.S.C.A. § 1381(a) (West 1985):

"§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability."

5. Section 4203(a) of ERISA, 29 U.S.C.A. § 1383(a) (West 1985):

"§ 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer –

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan."

6. Section 4212(a) of ERISA, 29 U.S.C.A. § 1392(a) (West 1985):

"§ 1392. Obligation to contribute

(a) Definition

For purposes of this part, the term 'obligation to contribute' means an obligation to contribute arising –

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions."

Statement of the Case

A. *Surplus Case*

The facts in this proceeding are not conceded by either side and create many disputed issues of material fact. The district court and the appellate panel chose those facts which support the outcome of their decisions. Such selective choosing on a summary judgment motion is contrary to the determinations of this Court. CCC will summarize below the disputed facts that were disregarded by the district and appellate courts and which CCC could prove at trial in overwhelming support of its position.

In 1977 longshore contract negotiations covering 36 ports from Maine to Texas broke down over the issue of job security. The impasse was finally broken when the ocean carriers and the International Longshoremen's Association, AFL-CIO ("ILA") agreed to the establishment of the JSP Agreement. The JSP Agreement provided for a carrier-funded safety net to local ILA port plans (pension, welfare and guaranteed annual income) that suffered net deficits in contributions (called "shortfalls") during a three-year contract period.

The JSP Agreement established a tonnage assessment mechanism (in Attachment B — JSP Tonnage Assessment) as an administratively convenient means to enable the carriers to set aside sufficient monies to satisfy any shortfalls that may occur. The assessment rate was to be a variable one calculated in an amount considered by the carriers to be necessary to meet any shortfalls and would be periodically adjusted by the carriers so that the total amount of assessments paid by them would not exceed their total shortfall obligations for any given three-year contract. The JSP Agreements, as with all ILA contracts,

ran for three-year periods — from October 1, 1977 to September 30, 1980; from October 1, 1980 to September 30, 1983; and from October 1, 1983 to September 30, 1986. The JSP Agreement and the JSP Tonnage Assessment each had separate but identical term-of-contract provisions.

JSP Agency, Inc. ("JSPA"), CCC's predecessor, was created by the carriers as part of the JSP Agreement to administer its terms. JSPA was formed as a Delaware, not-for-profit membership corporation whose members and directors were representatives of the carriers only. JSPA was obviously the agent of the carriers, not of the ILA or local port plans covered by the shortfall protection feature of the contract.[1]

In 1986, the carriers and the ILA agreed to discontinue the JSP Agreement, except for the purpose of meeting outstanding shortfall obligations through September 30, 1986, which were subsequently satisfied (with one case still pending in a district court). The total shortfall payments made pursuant to the JSP Agreement for the 1977-1986 contract periods amounted to approximately $106 - $108 million. The carriers and the ILA also expressly agreed in the 1986 contract that the disposition of any surplus monies would be discussed by the parties. That the carriers had agreed in the 1986 labor contract to discuss *their* JSP surplus with the ILA was thoroughly consistent with both the carriers' and the ILA's understanding that once the JSP Agreement ended and all shortfalls were paid, the balance in CCC was the carriers' money.

Their understanding also squares with that section of the JSP Tonnage Assessment which states that CCC "shall pay out such amounts only for obligations under the JSP Program and the expenses of administration thereof." (App. A at 15a). The phrase "obligations under the JSP Agreement" referred to shortfalls incurred during the term of the agreements. Thus, once the JSP Agreement was terminated, the carriers' liabilities for future shortfalls ceased.

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[1] JSPA changed its name to CCC in 1987. (App. A at 3a and n.2); (App. B at 34a).

Subsequently, in 1988 CCC and the ILA reached a settlement agreement that resolved the disposition of $57 million in surplus monies: $37 million was refunded to the carriers on the condition that it be used for the payment of prospective contributions to local ILA port plans, and the balance was retained by CCC for its ongoing collective bargaining activities on behalf of the carriers. The settlement agreement was approved unanimously by the ILA's Executive Committee and accepted by the local port plans in all 36 ILA ports except two — Mobile and Philadelphia.

The plans in these two ports then commenced actions[2] claiming entitlement to their claimed portion of the surplus monies.[3] These plans contended that it was the intent of the carriers and the ILA that upon termination of the JSP Agreement all surplus monies would belong to the local port plans, even if all shortfall obligations had been satisfied. Both sides moved for summary judgment.

B. *Withdrawal Liability Case*

Following the termination of the JSP Agreement the Mobile Steamship Association, Inc.-ILA Pension Plan ("Mobile Pension Plan" or "Plan") asserted a claim for withdrawal liability against CCC, contending that the prior shortfall payments it had received were akin to employer contributions that provide the basis for imposing this liability. CCC filed a complaint against the Mobile Pension Plan[4] seeking, *inter alia*, a declaratory judgment that it was not an employer liable for withdrawal liability. Both CCC and the Mobile Pension Plan moved for summary judgment.

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[2] The basis for district court jurisdiction was alleged to be 29 U.S.C.A. § 185 (West 1978) and 28 U.S.C.A. §§ 1331 (West 1966) and 1337 (West Supp. 1990).

[3] The action by the Philadelphia plans was transferred to the Southern District of Alabama and consolidated with the Mobile Plans' action.

[4] The bases for federal court jurisdiction of CCC's action are 28 U.S.C.A. §§ 1331 (West 1966), 1332(a), 1337 (West Supp. 1990) and 2201 (West Supp. 1990)-2202 (West 1982), and 29 U.S.C.A. §§ 1132(d)(1) and 1451(a) and (c) (West 1985).

The Decisions of the Lower Courts

In the surplus case, the district court granted summary judgment in favor of the Mobile and Philadelphia parties on June 22, 1989. It held that the JSP Agreement was ambiguous on three counts: the duration of the shortfall protection feature (App. B at 48a); the distribution of JSP surplus monies (App. B at 43a-44a, 49a-50a); and the characterizations of the JSP Agreement by JSP and ILA representatives. (App. B at 43a-44a, 50a).

The district court then resorted to extrinsic evidence to resolve these ambiguities. (App. B at 47a). It resolved these ambiguities not after a trial of the facts but in the context of a motion for summary judgment. After resolving all of the disputed factual issues in favor of the Mobile and Philadelphia plans, the district court awarded the Philadelphia plans $15,276,000 and the Mobile plans $4,218,000. CCC appealed.

The appellate court held that the district court was correct in viewing the JSP Agreement as ambiguous and resorting to extrinsic evidence to resolve these ambiguities. (App. A at 13a).[5] It held that where the district court resorts to parol evidence to resolve a contract ambiguity on a motion for summary judgment the standard of review is the clearly erroneous test. (App. A at 10a-11a, 15a n.18). The court of appeals largely affirmed the district court but reversed and remanded the issue of damages, finding "a genuine issue of material fact over the proper characterization of the 1988 Settlement Agreement payments. . . .". (App. A at 19a).

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[5] It is not disputed that after September 30, 1986 the carriers were not obligated to pay JSP tonnage assessments to CCC (App. A at 13a), since the term-of-contract clause in Attachment B — JSP Tonnage Assessment ran only through September 30, 1986 and the agreement was not renewed. Contrary to CCC's position, the court of appeals agreed with the district court that even though the JSP Agreement had its own separate but identical term-of-contract provision (again, running only through September 30, 1986), the lack of a cutoff date for shortfalls made this contract ambiguous. (App. A at 13a-14a and n.17). In other words, in the appellate court's view there had to be a third term-of-contract clause limiting shortfall payments to a particular date. Such a conclusion is illogical, since if the only purpose of the JSP Agreement was to pay shortfalls (App. A at 4a); (App. B at 37a, 48a), then the term-of-contract clause in the JSP Agreement itself would have been superfluous.

In the withdrawal liability case, a different district court judge held that CCC was an employer obligated to contribute to the Mobile-ILA Pension Plan ("Plan") and thus subject to withdrawal liability when it ceased its obligation. It held that the JSP Agreement was part of several interrelated collective bargaining agreements and thus regardless of whether CCC was a direct party to the Mobile-ILA local port agreement, CCC still had an obligation to contribute to the Plan under the JSP Agreement. (App. C at 74a-76a). It ordered arbitration of the amount of CCC's withdrawal liability.

The court of appeals largely affirmed the lower court's opinion, holding that the disclaimer of any promise by CCC to provide benefits was not legally relevant to whether CCC had an obligation to contribute to the Mobile Pension Plan. (App. A at 23a). It reversed the district court's ruling regarding attorney's fees and interest, holding that the Plan was entitled to this ancillary relief. (App. A at 26a-28a).

REASONS FOR GRANTING THE WRIT IN BOTH THE SURPLUS AND WITHDRAWAL LIABILITY CASES

The Surplus Case

1. (a) The court of appeals has so far departed from the accepted and usual course of judicial proceedings. Supreme Court Rule 10.1(a).

(b) Conflict with Applicable Decisions of this Court. Supreme Court Rule 10.1(c).

As to Summary Judgment

The court of appeals made a $20 million procedural error by upholding summary judgment in a case involving a contract it determined to be ambiguous and by not remanding the case to the district court for a trial to resolve disputed issues of material fact. In so doing, the court grossly misapplied the standards for granting summary judgment under Fed. R. Civ. P. 56. As this Court has recently held in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), in the summary judgment context the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue

for trial. *Id.* at 249 (*citing Adickes v. S.H. Kress and Company*, 398 U.S. 144, 158-59 (1970), and *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1953)).

Both the appellate court and the district court found the JSP Agreement to be ambiguous regarding the disposition of surplus funds upon the termination of the JSP Agreement and the duration of the shortfall protection feature:

> Nothing in the JSP agreements or the master contracts even mentioned the possibility of a surplus until the 1986 master agreement. Also, the contracts specified no cutoff date for the protection extended to employees under the JSP Program. Thus, the district court was correct in holding that the contracts were ambiguous and in admitting parol evidence in order to discern the parties' original intent as to the disposition of surplus funds.

(App. A at 13a).

The district court plainly admitted that the extrinsic evidence was in dispute (*e.g.*, CCC's deposition testimony was "contradictory" to that of an ILA representative on the central issue of the use of JSP funds). (App. B at 50a). And CCC argued that the same ILA official, whose earlier deposition testimony was so pivotal in the district court's conclusion, later contradicts himself by stating that once the shortfalls were paid the balance was the carriers' money. The deposition testimony of other witnesses is similarly in conflict.[6] These numerous disputed issues

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[6] In resolving disputed credibility issues on a summary judgment motion the appellate court not only disregarded this Court's holdings but also ignored its own precedents and the admonition of one of the appellate panel's own members. In *Fabrica Italiana Lavorazione Materie Organiche S.A.S v. Kaiser Aluminum & Chemical Corp.*, 684 F.2d 776, 780 (11th Cir. 1982), Circuit Judge Kravitch correctly noted that:

> [w]hen a contract term is reasonably susceptible of more than one interpretation, it is ambiguous and the resolution of its meaning is for the jury.

(Footnote continued)

of material fact should have led the courts below to deny summary judgment. That they did not is totally erroneous and contrary to this Court's holdings.

The appellate court's March 22, 1990 opinion was also incorrect to the extent that it stated that the district court's findings were subject to the clearly erroneous standard of review. (App. A at 10a-11a, 15a n.18). Although its June 22, 1990 order denying CCC's Petition for Rehearing and Suggestion for Rehearing In Banc deleted a footnote and revised a sentence in the body of the opinion (App. A at 15a); (App. E at 87a), the court evidently reaffirmed its earlier conclusion that "[i]f a district court determines that a contract is ambiguous and resorts to parol evidence in order to determine the intent of the parties, the court's determination of the parties' intent is one of fact and is subject to clearly erroneous review in this Court." (App. A at 10a-11a) (citation omitted). The clearly erroneous standard of Fed. R. Civ. P. 52(a) applies *after trial*, not on a summary judgment motion.

Moreover, the court of appeals' reliance on that language from the JSP Tonnage Assessment that CCC could use "such amounts only for obligations under the JSP Program" (App. A at 15a), is misplaced, since the term "obligations under the JSP Program" is by the court's own reasoning ambiguous as to the scope of the obligation and its duration. (*Compare* App. A at 14a *with* App. A at 15a). Nowhere in its opinion did the court of appeals hold that this contract was unambiguous as a matter of law, the necessary prerequisite before summary judgment can be granted.

As this Court recently reminded the lower courts, fact-finding has no place in the summary judgment context:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences

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See also Hinesville Bank v. Pony Express Courier Corp., 868 F.2d 1532, 1535 (11th Cir. 1989); *Scott Paper Company v. Taslog, Inc.*, 638 F.2d 790, 796 (5th Cir. 1981); *Johnson v. Johnson Chevrolet, Inc.*, 633 F.2d 716, 719 (5th Cir. 1980); *Freeman v. Continental Gin Company*, 381 F.2d 459, 465 (5th Cir. 1967).

> from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. at 255 (*citing Adickes v. S. H. Kress and Company*, 398 U.S. at 158-59). In short, the court of appeals has sanctioned a radical departure from the established legal precedents of this Court in permitting the district court to resolve disputed issues of material fact on a motion for summary judgment. Such a major error calls for an exercise of this Court's power of supervision. Supreme Court Rules 10.1(a) and (c).

As to ERISA's Applicability to CCC

The court of appeals decision also failed to give deference to the opinions of the U.S. Department of Labor ("DOL") and Treasury ("IRS"), who ruled that (a) CCC was not an employee benefit plan subject to ERISA[7] and (b) CCC's tax-exempt status as a business league did not preclude returning JSP surplus to its ocean carrier members.[8]

Both the appellate and the district court held that § 403(c) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. § 1103(c) (West 1985 & Supp. 1990), indirectly applied to CCC. (App. A at 15a-17a). That section prohibits the return to the employer of contributions previously paid by an employer to an ERISA-regulated employee benefit plan.[9]

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[7] Department of Labor, Pension and Welfare Benefit Programs Opinion, No. 81-48A (May 28, 1981) (available on LEXIS, Labor lib., ERISA file).

[8] Internal Revenue Service Private Ruling, dated December 8, 1988.

[9] Their conclusion is contrary to settled law. ERISA applies only to employee benefit plans, which it defines as either an "employee welfare benefit plan or an employee pension benefit plan." ERISA § 3(3), 29 U.S.C.A. § 1002(3) (West 1985 & Supp. 1990). It does not apply merely to the payment of employee benefits by an employer, nor does it apply to not-for-profit membership corporations such as CCC. *See Massachusetts v. Morash*, 490 U.S.____, 104 L.Ed.2d 98 (1989); *Fort Halifax Packing Company v. Coyne*, 482 U.S. 1, 7-8 (1987).

The court of appeals stated that although CCC did not fall under ERISA or § 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C.A. § 186(c)(5) (West Supp. 1990), ERISA's non-reversion provisions nevertheless should apply to CCC by virtue of federal labor policy. (App. A at 17a). *Ergo*, the appellate court concluded, CCC cannot return JSP surplus to the carriers. In so concluding, the court completely disregarded the views of the DOL and IRS.

It is axiomatic that the views of the Secretaries of Labor and Treasury (through the latter's delegate, the IRS) — the two main agencies responsible for administering ERISA — are to be given great deference by the courts. *Pension Benefit Guaranty Corp. v. LTV Corp.*, No. 89-390, 1990 U.S. LEXIS 3186 (June 18, 1990); *Massachusetts v. Morash*, *supra*, 104 L.Ed.2d at 109-10; *Mead Corp. v. Tilley*, 490 U.S.____, 104 L.Ed.2d 796, 805 (1989); *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (if the Court determines that Congress has not addressed the precise question at issue, the Court does not simply impose its own construction on the statute but must determine whether the agency's answer is based upon a permissible construction of the statute).

The IRS permitted CCC to return the surplus to the carriers via credit memoranda because it expressly found CCC was not an employee benefit plan subject to ERISA's non-reversion provisions, but a business league tax-exempt under 26 U.S.C.A. § 501(c)(6) (West Supp. 1990), which can return excess funds to its members. In so ruling, the IRS had before it each and every JSP and master agreement since 1977, CCC's Certificates of Incorporation and By-Laws from inception to date, as well as the DOL's earlier ruling that CCC was not an employee benefit plan subject to ERISA.[10]

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[10] In fact, ERISA § 1051(a), Pub. L. 93-406, 88 Stat. 951, amended Internal Revenue Code § 7802 to provide for the newly created Office of Assistant Commissioner for Employee Plans and Exempt Organizations ("EP/EO"). The EP/EO, from whom CCC sought its private ruling, administers both ERISA-regulated plans and non-ERISA exempt organizations (such as CCC). Obviously, the statute authorized the IRS to rule that CCC was not bound by ERISA's non-reversion provisions, which it did.

The court of appeals' disregard of the administrative agencies' views – by seeking to apply ERISA to CCC as part of federal labor policy – violates this Court's established precedent. Supreme Court Rule 10.1(c).

Accordingly, not only should the appellate panel's decision be vacated, but the district court should be instructed on remand not to apply ERISA to CCC.

The Withdrawal Liability Case

2. The court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. Supreme Court Rule 10.1(c).

As to the Employer Issue

This case raises significant issues of first impression involving the interpretation of the withdrawal liability provisions of a federal pension statute that affects virtually every industry in the United States. Since the decision in this case will serve as an important precedent in this developing area of the law, consideration by this Court is warranted.

Both the district and appellate courts were faced with the same question – Is CCC an "employer" as defined in the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA")[11] that can incur withdrawal liability to a multiemployer defined benefit pension plan? That law provides that if an employer withdraws from a multiemployer plan, it is liable to the plan for its proportionate share of the plan's unfunded, vested benefit liability, known as withdrawal liability. 29 U.S.C.A. §§ 1381(b), 1391 (West 1985). Both courts concluded that although MPPAA did not contain a definition of employer,

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[11] MPPAA, Pub. L. 96-364, 94 Stat. 1208, amended ERISA in 1980 to add the withdrawal liability provisions. *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720-25 (1984); *Connolly v. PBGC*, 475 U.S. 211, 213-17 (1986). MPPAA's withdrawal liability provisions are also referred to as Title IV of ERISA, Subchapter E, Part 1 and are codified at 29 U.S.C.A. §§ 1381-1405 (West 1985).

"the contributing obligor definition drawn from Title I [of ERISA] applies to the term 'employer' in Section [29 U.S.C.A.] 1381(a)." (App. A at 22); (*See also* App. C at 72a n.6, 73a-74a). They went on to find that since CCC had an obligation to contribute to the Mobile Plan by virtue of the shortfall protection feature of the JSP Agreement, *ipso facto* CCC was an employer liable for withdrawal liability to the Plan. (App. A at 23a); (App. B at 73a).

CCC does not take exception to the contributing obligor test *per se*. It objects to the superficial application of that standard to the particulars of this case. Even a cursory examination of the facts leads one ineluctably to the conclusion that JSP shortfall payments were not the type of payments to which withdrawal liability should attach.

The appellate and district court both failed to distinguish between the two types of payments that the Mobile Plan received in this case: contributions from the Mobile stevedores who had promised the defined benefits under the Plan and shortfall payments from CCC, an entity that had expressly disavowed any responsibility for benefits: "JSP shall protect only net shortfalls in contributions in the three plans and not the benefits provided by such plans." (1980 JSP Agreement at ¶ 7).[12] CCC's payments, unlike the stevedores' payments, were not made in conjunction with the benefit promises made *under* the Plan by the stevedores. CCC was never a party to the Plan. The Plan Agreement does not define CCC as an employer responsible for contributions. CCC was never listed as a contributing employer in the Plan's records or in the Plan's audited financial statements.[13]

The court of appeals' analysis of MPPAA contained two significant errors. First, it concluded that withdrawal liability

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[12] Since the court of appeals held that the JSP Agreement was interrelated with the master and local collective bargaining agreements (App. A at 11a-12a), then the Plan was bound by the express agreement of the collective bargaining parties that CCC would not be responsible for the benefits provided by the Plan.

[13] The effect of charging CCC with withdrawal liability is to reduce the Mobile stevedores' exposure by the same amount.

is imposed "when an employer ceases to have 'an obligation to contribute' *to* a plan. 29 U.S.C.A. §§ 1383(a)(1), 1385(a)." (App. A at 23a) (emphasis supplied). The appellate court substituted the word "to" for the statute's "under." *See* 29 U.S.C.A. § 1383(a)(1) (West 1985). The substitution is critical. The contribution obligation contemplated by the statute as providing the basis for imposing withdrawal liability is one that arises *under* the plan, *i.e.*, one that is intertwined with the benefit promises made *under* the plan by the parties to the plan.[14] The court's erroneous construction of the statute led it to conclude that any contribution obligation *to* a plan — even one that is undertaken with the express reservation that the contributor shall not be responsible for the benefits promised *under* the plan — can trigger withdrawal liability.

The second error committed by the court was its conclusion that withdrawal liability is calculated only on the basis of an employer's contributions "and not on the basis of the benefits that the employer promised to supply to plan participants." (App. A at 23a). The court's analysis ignored one-half of the statutory equation. In calculating withdrawal liability, MPPAA initially requires a determination of the employer's share of contributions. However, the statutory calculation does not end there. That fractional share must then be applied to the plan's total unfunded vested benefits. 29 U.S.C.A. § 1391 (West 1985). Thus, an employer's withdrawal liability represents its share of the promised benefits remaining unfunded. As noted above, the JSP Agreement explicitly disclaimed any such promise, and that disclaimer bound the Plan as a matter of law.

The appellate court's holding implicates the concerns raised by the two concurring Justices in *Connolly*. In their view, imposing withdrawal liability on a contributor where the benefits

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[14] Withdrawal liability occurs when (1) an employer promises to provide pension benefits to plan participants and (2) the employer underfunds the monies necessary to provide the promised benefits. If either element is missing, there can be no withdrawal liability. *Nachman Corp. v. PBGC*, 446 U.S. 359, 363 n.5 (1980); *see also Connolly v. PBGC*, 475 U.S. 211, 227 and 229-30 (1986) (O'Connor, J., concurring).

promised to the plan beneficiaries are not traceable to that particular withdrawn employer could be unconstitutional, since in effect MPPAA would be requiring someone to make good on benefits he never promised. 475 U.S. at 235.

Moreover, the appellate court's decision has foreclosed any possibility that management and labor can seek novel solutions to keep multiemployer defined benefit pension plans solvent. There is now a disincentive to provide such plans with unique additional funding (as in the case of JSP shortfall payments), since any payment to such a plan *ipso facto* results in withdrawal liability. Private solutions to pension funding problems have received a major setback by the decision of the court of appeals.

Accordingly, this Court should grant the petition to settle the important question of when and under what circumstances will a contributor to a multiemployer plan be deemed to be an "employer" liable for withdrawal liability.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
and
Mobile, Alabama
August 16, 1990

Respectfully submitted,

/s/ Peter Lambos

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APPENDIX

CARRIERS CONTAINER COUNCIL, INC.,

Plaintiff-Appellant, Cross Appellee,

v.

MOBILE STEAMSHIP ASSOC. INC.—International Longshoreman's Assoc., AFL-CIO Pension Plan and Trust, and its trustees F.D. Alspaugh, Arthur W. Stratton, Hartwell Ludlow, Ned Mattingly, Felix Cleveland, Henry L. Clarke, Albert Walton, Jr., Seymour Irby,

Defendants-Appellees, Cross Appellants.

CARRIERS CONTAINER COUNCIL, INC.,

Plaintiff-Appellee,

v.

MOBILE STEAMSHIP ASSOCIATION, INC., International Longshoreman's Assoc., AFL-CIO Pension Plan and Trust and its trustees, F.D. Alspaugh, Arthur W. Stratton, Hartwell Ludlow, Ned Mattingly, Felix Cleveland, et al.,

Defendants-Appellants.

MOBILE STEAMSHIP ASSOCIATION, MSSA-ILA Pension Plan & Welfare Plans, MSSA-ILA Local 1985 Maintenance Employees' Pension Plan, PMTA-ILA Pension Fund, PMTA-ILA Welfare Fund, PMTA-ILA Supplemental Unemployment Compensation Benefit Plan, et al.,

Plaintiffs-Appellees,

v.

CARRIER'S CONTAINER COUNCIL, INC.,

Defendant-Appellant,

International Longshoreman's Association, AFL-CIO,

Intervenor-Defendant.

Nos. 89-7279, 89-7451 and 89-7505.

United States Court of Appeals, Eleventh Circuit.

March 22, 1990.

Appeal was taken from judgments of the United States District Court for the Southern District of Alabama, Nos. 88-0095-BH, 87-0553-B, William Brevard Hand and Charles R. Butler, Jr., JJ., entered in dispute concerning carriers' association's alleged surplus contributions to employee benefits designed to cover shortfalls in local longshoreman's pension plans, and association's potential

withdrawal liability under Multiemployer Pension Plan Amendments Act. The Court of Appeals, Johnson, Circuit Judge, held that: (1) parol evidence and federal labor policy supported conclusion that fund was designed to benefit local pension plans; (2) fact issue precluded summary judgment on issue of damages with regard to surplus funds; (3) association was an employer subject to withdrawal liability under Multiemployer Pension Plan Amendments Act; and (4) association was required to make interim payments to local pension plans.

Affirmed in part and reversed in part.

Appeals from the United States District Court for the Southern District of Alabama.

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JOHNSON, Circuit Judge:

These cases are consolidated for appeal after the district court's denial of summary judgment to Carriers Container Council ("CCC") and grant of summary judgment to the Mobile Steamship Association, Inc. ("MSA"), the Philadelphia Marine Trade Association ("PMTA"), and other plaintiffs in No. 89-7505, after the district court's denial of summary judgment to CCC and grant of summary judgment to MSA in No. 89-7279, and after the district court's disposal of the parties' post-judgment motions in 89-7279.[1]

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[1] The district court's disposition of the post-judgment motions in No. 89-7279 was the subject of a separate appeal, which this Court designated as No. 89-7451. Accordingly, while we are considering three consolidated appeals, only two litigations are involved.

I. FACTS

A. *Background*

Both of these cases concern the relationship between CCC and Mobile Steamship Association/International Longshoremen's Association ("MSA-ILA") employee benefit plans. The first case, No. 89-7505, concerns the disposition of surplus monies held by an East-Coast-wide fund that was designed to cover shortfalls in contributions to local longshoremen's pension plans such as the MSA-ILA Pension and Welfare Plans ("Mobile Plans") and the PMTA-ILA Pension, Welfare and Supplemental Unemployment Compensation Benefit Plans ("Philadelphia Plans"), which are involved here. The fund is called the Job Security Program ("JSP Program") and is administered by CCC.

The JSP Program grew out of a 1977 labor dispute between the International Longshoremen's Association, AFL-CIO ("ILA") and vessel carriers, stevedoring companies, and their employer associations. Up to that time, contributions to local port pension plans were based on the number of man-hours worked by ILA labor. The advent of containers, however, had begun to transform the shipping industry. Carriers began concentrating their calls in large mechanized ports such as New York, where the containers were transferred to trucks or railroads for distribution. As a result, there were fewer calls in smaller ports such as Mobile, fewer man-hours worked by ILA members in those ports, and fewer dollars contributed to the pension funds in those ports. The ILA demanded some form of protection for local pension funds from the problem of declining contributions.

CCC and its predecessor, the Job Security Program Agency, Inc. ("JSPA")[2], are associations of the shipping companies ("carriers") that signed contracts with the ILA and local port unions

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[2] The parties and the record refer to CCC and JSPA interchangeably. Because CCC and JSPA are essentially the same entity, we refer to both as "CCC."

in order to form the JSP Program. CCC was formed by the carriers to carry out the terms of the JSP agreement (i.e., to assess amounts due to the JSP shortfall fund from individual carriers, and to pay local plans like the Mobile and Philadelphia plans for shortfalls in contributions). CCC is empowered to negotiate for its members on JSP matters.

The JSP Program agreements provided that the carriers would pay a royalty assessment on each ton of cargo loaded or unloaded by ILA labor in ports from Maine to Texas. CCC would hold the assessments in a fund for use in paying shortfalls in local pension plan contributions. The carriers and the ILA (and its regional subdivisions) signed the first JSP agreement on November 13, 1977. A successor JSP agreement, also signed by the carriers and the ILA, was executed on May 27, 1980, covering a term from October 1, 1980 to September 30, 1983. In 1983, the parties did not sign a separate JSP agreement. The 1983 Maine to Texas "master contract"[3] between the ILA and employer associations did provide, however, that the JSP Program would be updated and extended by the carriers.

On September 5, 1986, the ILA and many of the employer associations, including CCC, signed a new master agreement, providing that the JSP Program would end, except for the purposes of meeting any existing obligations of the fund. This agreement further provided that "[a]ny surplus . . . shall be discussed with the ILA." The Mobile and Philadelphia Plans, MSA, and PMTA (the Philadelphia employer group), did not

[3] Collective bargaining in the longshore industry takes place on two levels. First, bargaining on a national level (Maine to Texas) takes place between the ILA, vessel carriers, and employer associations such as MSA, which represents stevedoring companies in the port of Mobile. The national bargaining results in a master agreement that fixes master terms of employment such as wages, hours, pension contributions, and welfare contributions. Second, bargaining on a local level is between ILA locals and local employer associations. Local bargaining results in a local port agreement that incorporates the master agreement and also establishes terms and conditions of employment for the particular port.

participate in these negotiations and did not sign the 1986 master agreement.[4]

In 1988, CCC, the ILA, and a number of local port plans, employer associations, and local unions entered into a settlement agreement ("the 1988 Settlement Agreement") concerning outstanding shortfall claims against CCC. Neither the Mobile nor the Philadelphia plans agreed to sign the 1988 Settlement Agreement. Under the 1988 Settlement Agreement, CCC paid $21,850,000 to settle $63,228,000 in outstanding shortfall claims.[5] As a result of the 1988 Settlement Agreement, CCC had a surplus of $57 million ("surplus").

The first case before this Court, No. 89-7505 [hereinafter "the surplus case"], concerns the disposition of this surplus. The Mobile and Philadelphia Plans contend that the JSP fund was given to the local port plans in exchange for ILA work completed and that, therefore, CCC is obligated to pay all monies remaining in the JSP fund to the local plans. CCC contends that the member carriers of CCC were obligated to contribute only those amounts necessary to cover shortfalls in contributions during the terms of the JSP agreements and that, therefore, any surplus can be retained by CCC or returned to the member carriers.

The second case before this Court, Nos. 89-7279 and 89-7451 [hereinafter "the withdrawal case"], concerns the withdrawal liability of CCC to the Mobile Plan under ERISA Section 4201, 29 U.S.C.A. § 1381. CCC contends that it is not an "employer" within the meaning of section 1381 and that it therefore has no withdrawal liability. MSA contends that CCC is a "contributing

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[4] MSA signed the 1980 and 1983 master agreements. The Council of North Atlantic Shipping Associations ("CONASA"), of which PMTA is a member, signed the 1977, 1980 and 1983 master agreements.

[5] CCC also agreed to distribute $30,500,000 to five ports that did not have pending shortfall claims as a distribution of "surplus" JSP funds.

obligor" to the Mobile Plan and is, therefore, an employer subject to withdrawal liability under section 1381.

B. *Proceedings in the District Courts*

1. *The Surplus Case*

In the surplus case, the district court granted summary judgment to MSA and PMTA. The court concluded that the JSP agreement was the product of "interrelated collective bargaining agreements" involving the ILA, the carriers, the employer associations (including MSA and PMTA), and the ILA local unions, and that parties to the master agreements and the local agreements were also parties to the JSP agreement. Based on this conclusion, the court found that MSA and PMTA had standing to bring an action based on the JSP agreements.

Because the JSP agreements and master agreements did not mention the possibility of a surplus, the district court concluded that the agreements were ambiguous and that parol evidence should be admitted to determine the intent of the parties. It considered as parol evidence the parties' characterizations of the JSP Program as a "trust fund," an " 'insurance' program to protect local port plans," and "escrow or feeder fund," employer "contributions" to the local port plans, and a negotiated benefit intended as "compensation" for ILA labor. In addition, the court considered language from the JSP agreement indicating that money collected under the JSP Program could be used only to benefit the local port plans.

The district court also determined that the interpretation of the JSP agreement was governed by section 301 of the Labor Management Relations Act (the "LMRA"), 29 U.S.C.A. § 185(a), and the federal common law developed under that section. The court found that ERISA and the policies behind ERISA were one source of this federal common law. Further, the court found that the policies reflected in section 403 of ERISA , 29 U.S.C.A. § 1103(c), which prohibits the use of assets in an employee benefit

plan to benefit an employer, apply to the JSP funds.[6] After considering the language of the contract, the parol evidence, and the federal common law, the court found that the contract restricted the JSP funds to uses benefitting the local port plans. The court, therefore, ruled that CCC could not refund any money to the carriers, that CCC must pay the Mobile and Philadelphia plans their pro rata shares of the surplus ($4,218,000 for the Mobile Plan and $15,276,000 for the Philadelphia Plan), and that MSA and PMTA could recover attorneys' fees.

2. *The Withdrawal Case*

The dispute over CCC's withdrawal liability to the Mobile Plan began on December 21, 1987, when the Mobile Plan notified CCC by letter that the Plan had determined that CCC had completely withdrawn as an employer and was therefore obligated to pay the Plan withdrawal liability of $1,236,836. The Mobile Plan demanded that CCC pay the withdrawal liability in accordance with an installment schedule included in the letter.[7] On January 12, 1988, CCC asked the Mobile Plan to reconsider its determination that CCC had withdrawal liability to the Mobile Plan.[8]

On February 3, 1988, CCC commenced this action for a declaratory judgment that CCC is not an employer subject to withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("the MPPAA"). On February 29, 1988, the Plan counterclaimed for an order holding CCC responsible for the withdrawal liability, directing CCC to pay the outstanding withdrawal liability plus interest pursuant to 29 U.S.C.A. § 1399(c)(5), and awarding the Mobile Plan attorneys' fees under

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[6] The court also cited 29 U.S.C.A. § 186(c)(5) (LMRA) as reflecting a similar policy.

[7] Notification and demand of payment are required of a plan sponsor under 29 U.S.C.A. § 1399(b)(1) as soon as practicable after an employer's withdrawal.

[8] Under 29 U.S.C.A. § 1399(b)(2)(A), an employer must request reconsideration of its withdrawal liability by the plan sponsor within 90 days.

29 U.S.C.A. § 1132(g)(2). On July 25, 1988, CCC and the Mobile Plan filed cross motions for summary judgment, and on March 21, 1989, the district court entered its findings of fact, conclusions of law, and order.

The court found that the term "employer," as used in 29 U.S.C.A. § 1381(a), is meant to include a person who is obligated to contribute to a plan either as a direct employer or in the interests of an employer of the plan's participants.[9] Then the court determined that CCC was a person obligated to contribute to the Mobile Plan under interrelated collective bargaining agreements (the JSP agreements, the master agreements, and the local port collective bargaining agreements). Finally, it held that CCC was therefore an employer within the meaning of section 4202 of the MPPAA, 29 U.S.C.A. § 1382, and had withdrawal liability to the Mobile Plan.

The court directed the parties to arbitrate the amounts of interim payments to be made by CCC. The court rejected the Mobile Plan's request for the attorneys' fees under 29 U.S.C.A. § 1132(g)(2), which authorizes awards of attorneys' fees where a fiduciary sues a contributor for delinquent contributions. *See* 29 U.S.C.A. §§ 1132(g)(2), 1145.

In a post-judgment order dated May 5, 1989, the district court ordered CCC to make all overdue payments of withdrawal liability with interest, and denied CCC's motion to pay the money into an escrow account. The court did not, however, order CCC to make the payments according to the schedule in the Mobile Plan's December 21, 1987 letter. The court also refused to accelerate payment of the entire amount of CCC's withdrawal liability under 29 U.S.C.A. § 1399(c)(5). Finally, the court denied the Mobile Plan's motion for liquidated damages and attorneys' fees under 29 U.S.C.A. § 1132(g)(2) because the Mobile Plan

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[9] This definition is drawn from the definition of "employer" set forth in Title I of ERISA, 29 U.S.C.A. § 1002(5), and from the definition of "withdrawal" set forth in 29 U.S.C.A. §§ 1383(a), 1385(a).

had offered no proof of a liquidated damages provision[10] or of costs and attorneys' fees.[11]

In sum, CCC appeals the grants of summary judgment under Federal Rule of Civil Procedure 56(c) in both cases. The Mobile Plan appeals the denial of interim withdrawal liability payments, interest, damages, and attorneys' fees in the withdrawal liability case.

In this appeal we first consider whether the district courts in both cases erred in holding that the JSP agreement was the product of interrelated collective bargaining agreements and that, therefore, parties to the master agreements and the local agreements were parties to the JSP agreement and vice versa. Second, we consider whether the district court in the surplus case erred in holding that the JSP agreement was ambiguous and that parol evidence should be admitted. Third, we consider whether the district court in the surplus case erred in holding that the JSP funds should benefit the local plans exclusively. Fourth, we consider whether the district court in the surplus case erred in calculating the amount of the CCC surplus that should be paid to the Mobile and Philadelphia Plans. Fifth, we consider whether the district court in the withdrawal case erred in holding that CCC was an "employer" under the MPPAA and therefore subject to withdrawal liability under 29 U.S.C.A. § 1381(a). Sixth, we consider whether the district court in the withdrawal case erred in ruling that CCC had withdrawn from the Mobile Plan. Seventh, we consider whether the district court in the withdrawal case erred in refusing to order CCC to begin payments of withdrawal liability immediately on the basis of the Mobile Plan's schedule of payments. Finally, we consider whether the district court in the withdrawal case erred in ruling

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[10] The Mobile Plan's contract (the MSSA-ILA Pension Plan) does not contain a liquidated damages provision.

[11] The May 5, 1989 post-judgment ruling and a subsequent denial by the court of the Mobile Plan's motion to reconsider the May 5, 1989 order are the basis of the Mobile Plan's appeal No. 89-7451.

that the Mobile Plan was not entitled to attorneys' fees and liquidated damages under 29 U.S.C.A. § 1132(g)(2).

II. STANDARD OF REVIEW

[1, 2] The district court orders granting summary judgment are subject to *de novo* review by this Court. *Shipes v. Hanover Ins. Co.*, 884 F.2d 1357, 1359 (11th Cir. 1989). The court must ask whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The governing law determines what facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The Court reviews the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. All factual doubts are resolved in favor of the nonmovant CCC. *Hinesville Bank v. Pony Express Courier Corp.*, 868 F.2d 1532, 1534-35 (11th Cir.1989); *Buxton v. City of Plant City*, 871 F.2d 1037, 1040-41 (11th Cir.1989).

III. DISCUSSION

A. *The JSP Agreement Was Part of a Group of Interrelated Collective Bargaining Agreements*

[3,4] CCC argues that the only parties to the JSP Agreements were the carriers and the ILA, and that the carriers were not parties to the master contracts and local port agreements. CCC believes that the district courts in both cases erred by holding that the JSP agreement was part of a group of interrelated collective bargaining agreements. The interpretation of an unambiguous contract is a question of law, reviewable *de novo* by this Court. *International Bhd. of Boilermakers v. Local Lodge D111*, 858 F.2d 1559, 1561 (11th Cir. 1988). The district court's determination that a contract is ambiguous is also a question of law. *Id.* A contract term is ambiguous if it is reasonably susceptible to more than one interpretation. *Id.* If a district court determines that a contract is ambiguous and resorts to parol evidence in order to determine the intent of the parties, the

court's determination of the parties' intent is one of fact and is subject to clearly erroneous review in this Court. *Brewer v. Muscle Shoals Bd. of Educ.*, 790 F.2d 1515, 1519 (11th Cir.1986).

[5] The form and language of the JSP agreements and the master contracts unambiguously indicate that the signatories of each intended the incorporation by reference of the JSP agreement in the master contracts. On the one hand, the signatories to the master agreement[12] incorporated the JSP agreement into the master agreement. The 1977 master agreement stated,

> The following is agreed to by NYSA, CONASA, and ILA in final and complete settlement of the seven (7) master contract issues:
>
> * * * * * *
>
> 6. Containerization
>
> As set forth in appended Agreement and appended JSP Program, as applicable to New York and CONASA ports.[13]

The 1977 and 1980 JSP agreements were attached to the master contracts. This form and language in the master contracts clearly state the intention of the signatories to incorporate the JSP agreement into the master contracts.[14]

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[12] The master agreement consists of one page, setting out wage increases and referring to other documents. The skeletal form of the master agreement indicates that the referenced documents were intended to be incorporated into the master agreement. The master agreement would not be complete without the referenced documents.

[13] The 1980 master contract was in the same form and had similar language. The 1983 master contract provided that "the JSP program shall be updated and extended by the Carriers."

[14] Incorporation by reference is not uncommon in labor agreements. *See, e.g., Boilermakers*, 858 F.2d at 1561 (reading together union constitution and merger agreement); *McDonald v. Hamilton Elec., Inc. of Fla.*, 666 F.2d 509, 512 (11th Cir.1982) (letters of assent to collective bargaining agreement incorporate only those provisions in the agreement at the time of the letter of assent).

On the other hand, the signatories to the JSP agreement contemplated an incorporation by reference of the JSP agreements into the master contracts and the local contracts. Paragraph 9 of the JSP agreement, entitled *"Signatories"* mandates that each local port association (e.g., PMTA and MSA) subscribe to the JSP agreement and agree to be bound by its terms.[15]

The history of the 1977 ILA labor negotiations also supports this interpretation. The ILA refused to sign the master contract and struck the carriers, refusing to unload their ships until a JSP agreement was signed. The carriers signed the JSP agreement in order to induce the ILA to sign the master contract and the local agreements and resume unloading the carriers' ships. When the carriers signed the JSP agreement, the ILA and the employer associations immediately signed the master contract. Accordingly, both district courts were correct in holding that the master contracts and the JSP agreements were part of interrelated collective bargaining agreements.[16]

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[15] The JSP agreements contained the following provision:

> 9. **Signatories**
>
> Each Carrier, private or governmental, which utilizes or contracts for employees covered by this agreement shall be required to execute this agreement and to furnish any undertaking required for faithful performance of the requirements of this agreement, provided, however, that *no Carrier shall be required to furnish such an undertaking to any local port association unless such association subscribes to this agreement and agrees to be bound by its terms and conditions.*

(emphasis added)

[16] In *JSP Agency, Inc. v. American Sugar Refining Co.*, 752 F.2d 56 (2d Cir.1985), the Second Circuit held that the JSP agreement was not incorporated into the master contract and therefore that parties to the master contract were not bound by the JSP agreement. The court relied on a concession by CCC's attorney at trial that the JSP agreement and the master agreement were separate documents and that parties to the master agreement were not parties to the JSP agreement. *Id.* at 62. Given CCC's position in that case, CCC's concession was fatal (CCC was attempting to collect assessments from a stevedoring company whose agent had signed the master agreement but not the JSP agreement and, therefore, CCC had to argue that signatories to the master contract were bound by the JSP agreement). CCC cannot use its blunder in the Second Circuit to defeat a finding of incorporation by reference in this case.

(Footnote continued)

B. *The Surplus Case*

1. *The JSP Agreement Was Ambiguous on the Disposition of Surplus Funds*

[6] CCC also argues that the JSP agreement was unambiguous and that, therefore, the district court in the surplus case erred in referring to parol evidence in order to determine the intentions of the parties. Whether a contract is ambiguous is a question of law which this Court reviews summarily. *Boilermakers*, 858 F.2d at 1561. A contract is ambiguous if it is susceptible to more than one meaning. *Id.*

[7] CCC's argument lacks foundation. Nothing in the JSP agreements or the master contracts even mentioned the possibility of a surplus until the 1986 master agreement. Also, the contracts specified no cutoff date for the protection extended to employees under the JSP Program. Thus, the district court was correct in holding that the contracts were ambiguous and in admitting parol evidence in order to discern the parties' original intent as to the disposition of surplus funds. *International Union of United Auto Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1481 (6th Cir. 1983)(considering the course of conduct of the parties); *see Communications Wkrs. of Am. v. Southwestern Bell*, 415 F.2d 35, 40-41 (5th Cir.1969).

CCC argues that the "term" clause of the JSP agreement, which stated that the JSP agreement would remain in effect for a period of three years, and the "JSP Tonnage Assessment" agreement, which limited the obligations of the carriers to contribute to the JSP Program to three year terms, cut off the JSP Program's shortfall protection upon the expiration of each three year term.[17]

The Second Circuit assumed that the JSP agreement was incorporated into the master contract in *Korea Shipping Corp. v. New York Shipping Assoc.*, 880 F.2d 1531 (2d Cir.1989). "[I]n signing the master contract and the [local port agreement] the carriers obligated themselves to pay 'job security program assessments' in order to aid in the funding of shortfalls in certain longshore pension, welfare, and trust funds." *Id.* at 1534.

[17] In arriving at the conclusion that the JSP agreement does not provide for return of funds to the carriers upon termination of the program, the district

(Footnote continued)

In *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669 (6th Cir.1985), and *Yard-Man*, 716 F.2d at 1476, the Sixth Circuit held that a general term clause in a collective bargaining agreement does not imply a cutoff date for other clauses of the agreement that have no durational language. *Weimer*, 773 F.2d at 675-76; *Yard Man*, 716 F.2d at 1482-83. We fully concur with the Sixth Circuit's reasoning in *Weimer* and *Yard-Man*, *see United Steel-workers of Am. v. Connors Steel*, 855 F.2d 1499, 1505 (11th Cir.1988). Even in light of the term clauses, therefore, the lack of a cutoff date leaves the duration of the JSP agreement's shortfall protection (and thus the intended disposition or surplus CCC funds) ambiguous.

2. *The JSP Funds Were Intended to Benefit the Local Plans*

a. The Contract Language and Parol Evidence

[8] CCC argues that the district court erred in holding that the parties intended CCC funds to benefit the local plans exclusively because the parties never intended that the carriers would pay into CCC any more than was necessary to cover the shortfalls that occurred during the terms of the JSP agreements. Under the JSP agreements, CCC was to adjust the level of assessments on a quarterly basis and increase, decrease, or suspend the assessments payable to CCC depending on CCC's anticipated needs. Attachment B, the JSP Tonnage Assessment, provided: "On or about April 1, 1978 and on a quarterly basis thereafter, the Carriers shall estimate the total obligations for shortfall incurred to date from all sources including information supplied by the local Port Associations and shall either increase, decrease, adjust or suspend such assessments, depending on experience." Based on this passage, CCC argues that the only purpose of the tonnage assessments was to pay for the shortfalls that occurred during the term of the agreements.

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court considered the limitation on payouts in the JSP Tonnage Assessment agreement. The court held that the three year term specified in the JSP Tonnage Assessment agreement applied only to the obligation of the carriers to pay into the fund through tonnage assessments, and not to the protection that the JSP program extends to the local port plans.

The flexible nature of the tonnage assessments is CCC's best argument for returning surplus funds to the carriers. If the carriers mistakenly overpaid when contributing to CCC, then it would seem fair to return the surplus funds to them. The flexible nature of the JSP tonnage assessments, however, does not change the interpretation of the contract under federal common law. The district court's interpretation is correct for two reasons: other language in the contract, and federal labor policy.

The Tonnage Assessment attachment to the 1977 JSP agreement provides:

> Such tonnage assessment amounts shall be collected as necessary from the Carriers by the administrative agency (to be known as [CCC]) created by the Carriers which shall pay out the shortfall payments required by this Agreement. . . . [CCC] shall hold such amounts in interest-bearing accounts or in appropriate investment accounts and shall pay out such amounts only for obligations under the JSP Program and the expenses of administration thereof.

This language from the agreement, and the parties' characterizations relied on by the district court,[18] support the conclusion that CCC funds were intended to benefit the local port plans only and should not be returned to the carriers.[19]

b. Federal Labor Policy

[9] The court should review its interpretation of a labor-management contract for consistency with federal labor policy.

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[18] *See* Part I.B.1., *supra*. The district court's finding of the intent of parties is subject to clearly erroneous review to the extent that the court relied on extrinsic evidence to reach the finding. *Brewer*, 790 F.2d at 1519.

[19] CCC also cites a provision in its certificate of incorporation as evidence of the parties original intent that funds could be returned to the carriers. That provision, however, related to dissolution of CCC, which has not yet occurred. Moreover, it is unlikely that the parties would have looked to CCC's cerficate of incorporation to express their intent as to the ultimate disposition of CCC assessments.

Yard-Man, 716 F.2d at 1480. The court's interpretation of the contract need not affirmatively promote a particular policy, but it should not violate a basic principle of federal labor law. *Id.* at 1480. ERISA section 403(c)(1), 29 U.S.C.A. § 1103(c)(1), provides that assets of an employee benefit plan shall never inure to the benefit of an employer and shall be held for the exclusive benefit of plan participants and their beneficiaries. Section 1103(c)(2)(A)(ii) provides that if an employer makes a contribution to a multiemployer plan by a mistake of fact or law, the employer may obtain a refund from the plan, but only within six months of the plan administrator's determining that a mistake occurred. Although the JSP Program does not fall within ERISA as a matter of law, the federal common law for interpreting labor-management contracts draws on statutes such as ERISA. *See Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57, 77 S.Ct. 912, 917-18, 1 L.Ed.2d 972 (1957). Thus, the policy of section 1103(c)(2)(A) applies to the interpretation of the contracts in this case.

Section 1103(c) reflects a policy of limiting an employer's access to monies once he has paid them into a fund for the benefit of employees, even if the payment was by mistake. In this case, CCC argues that the tonnage assessments were mistakenly too high and that, therefore, the carriers deserve a refund.

The Ninth Circuit recently rejected CCC's position in a case where employers sought the return of surplus funds in an ERISA trust that was terminating. *British Motor Car Distrib. v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371 (9th Cir.1989). In that case, the employers argued that the surplus was the result of incorrect actuarial projections of the fund's needs and that this was a mistake of fact that entitled them to a refund under section 1103(c)(2)(A)(ii). *Id.* at 374. The court rejected this argument and held that overly generous contributions to an employee trust that result in a surplus are not a mistake of fact for purposes of section 1103(c)(2)(A)(ii) unless they are the result of clerical or arithmetic error. Incorrect actuarial assumptions, the court said, are not a basis for finding

mistake of fact. *Id.* at 375-77. The Ninth Circuit ruled that the surplus funds should be transferred to successor trusts in favor of the employees. *Id.* at 378-79. We agree with the Ninth Circuit and hold that under federal common law, as reflected in ERISA, CCC cannot refund any assessments to the carriers.

[10] CCC argues that the policies of ERISA do not apply because the JSP Program was neither an employee benefit plan within ERISA nor a fringe benefit plan within 29 U.S.C.A. § 186(c)(5). In support of its argument, CCC cites a letter opinion from the Secretary of Labor that CCC (then JSPA) is not an employee benefit plan within ERISA.[20] CCC's argument fails to address the reasoning of the district court. As the district court conceded, the JSP Program does not fall under ERISA or section 186(c)(5). That finding, however, does not resolve the question of the proper characterization of surplus funds held by CCC. The district court did not hold that ERISA itself applied; the federal common law of labor applied, *Lincoln Mills*, 353 U.S. at 456-57, 77 S.Ct. at 917-18, and the content of the federal common law is determined by reference to federal labor policies such as those reflected in ERISA and section 186(c)(5). *Id.*[21] Moreover, as the district court observed, the JSP Program was created to benefit the local port plans. Because the assessments that make up the surplus were collected for the purpose of benefiting ERISA-governed funds, the policies behind ERISA are relevant to the question of what should happen to the surplus. Accordingly, CCC's argument that the district court erred in referring to ERISA and section 186(c)(5) is meritless.

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[20] Dept. of Labor Opinion 81-48A (May 28, 1981)(available on LEXIS).

[21] CCC also argues that under *Firestone Tire and Rubber Co. v. Bruch*, ___ U.S. ___, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), its decision to refund money to the carriers can be reversed only if it was arbitrary and capricious or an abuse of discretion. *Firestone* involved a trust administrator's decision to deny the severance benefit claims of employee beneficiaries under a plan. *Id.* 109 S.Ct. at 951. The decision of a plan administrator to return money to an employer is clearly different from the decision at issue in *Firestone* and falls squarely within 29 U.S.C.A. § 1103(c). CCC's argument based on *Firestone*, therefore, is meritless.

3. *Restitution*

[11] The district court awarded the Philadelphia and the Mobile plans restitution damages. In calculating the amount of damages the court's stated purpose was to award the Philadelphia and Mobile plans a portion of CCC's surplus funds proportional to the total shortfall awards made by CCC to the Mobile and Philadelphia plans during the lifetime of the JSP Program. Under federal common law, the federal courts must fashion effective remedies for the impairment of federally created rights in the field of labor relations. *Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth.*, 667 F.2d 1327, 1345 (11th Cir.1982); *Rozay's Transfer v. Local Freight Drivers, Local 208*, 850 F.2d 1321, 1335 (9th Cir.1988); *see Lincoln Mills*, 353 U.S. at 459, 77 S.Ct. at 919.

The district court's calculations were as follows:

(1) total shortfall payments by CCC = $75,713,312;

(2) total shortfall payments to Philadelphia plan = $20,345,209 (26.8%);

(3) total shortfall payments to Mobile plan = $5,629,027 (7.4%);

(4) total surplus in CCC fund = $57,000,000;

(5) Restitution due Philadelphia plan = $15,276,000;

(6) Restitution due Mobile plan = $4,218,000

[12] CCC criticizes this damages calculation on three grounds. First, CCC argues that if the purpose of the tonnage assessment was to compensate ILA laborers for work completed, then the court should have distributed the surplus among the port plans in proportion to the number of tons of cargo unloaded by ILA laborers in each port. This suggestion ignores the purpose of the JSP agreement, which was to channel funds to port plans where shortfalls occurred due to decreases in the number of tons unloaded by ILA labor. CCC's proposal would do the opposite.

Second, CCC challenges the district court's figures. CCC alleges that $37,000,000 of the $57,000,000 surplus is in the form of credit memos from the carriers, and should not be included in the surplus. This would reduce the surplus to $20,000,000 (CCC states that the final figure is $24,000,000). To allow this re-characterization of funds would defeat the purposes of ERISA section 403, 29 U.S.C.A. § 1103(c), by allowing money due to CCC to inure to the benefit of the carriers. This argument, therefore, must fail.

Third, CCC argues that the total shortfalls paid under the JSP Program should include the $30,500,000 that CCC paid to other ports in the 1988 Settlement Agreement. CCC argues that the payment of this amount "was thoroughly consistent with the shortfall protection feature of the JSP Agreement." CCC cites the affidavit of former ILA president Thomas W. Gleason, who helped to create the JSP Program, to support this argument. CCC also argues that the total shortfall payments figure should be increased by $398,828 to reflect the amount that the Mobile plan received in its May 5, 1988, settlement agreement.[22] The plans allege that the $30,500,000 paid by CCC in the 1988 Settlement Agreement was not a shortfall payment because CCC characterized the payment as "surplus" and because the five ports paid did not have outstanding shortfall claims. Accordingly, there is a genuine issue of material fact over the proper characterization of the 1988 Settlement Agreement payments, and we reverse the district court's damages award and remand the issue of damages to the district court. *See Boilermakers*, 858 F.2d at 1561.

C. *The Withdrawal Liability Case*

On its appeal of the district court's grant of summary judgment in the withdrawal liability case, CCC challenges the district court's determination that CCC is an "employer" for purposes of 29 U.S.C.A. § 1382, and the district court's determination that CCC is subject to withdrawal liability under section

[22] This would leave the total shortfall payments made by CCC at $106,612,140.

1381. The Mobile Plan cross-appeals the district court's failure to order CCC to immediately begin interim payments under 29 U.S.C.A. § 1401(d) and the district court's failure to award liquidated damages and attorneys fees to the Mobile Plan under 29 U.S.C.A. § 1132(g)(2).

1. *The Contributing Obligor Test for Determining Who Is an Employer*

Congress enacted ERISA, 29 U.S.C.A. §§ 1001-1461, in order to prevent losses to employees and their families caused by the failure of vested pension benefits. Congress was concerned that pension benefits were failing because employers were terminating their contributions to pension plans before the plans accumulated sufficient funds to cover all of the employee benefits that had been promised. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720, 104 S.Ct. 2709, 2713, 81 L.Ed.2nd 601 (1984); *Korea Shipping Corp. v. New York Shipping Ass'n*, 880 F.2d 1531, 1536 (2d Cir.1989). Congress passed the MPPAA as an amendment to ERISA in order to protect multi-employer pension plans from the financial burdens that result when one employer withdraws from a multiemployer plan without first funding uncovered liabilities of the plan attributable to the employer. *R.A. Gray & Co.*, 467 U.S. at 722-23 & n. 2, 104 S.Ct. at 2714-15 & n. 2; *Korea Shipping*, 880 F.2d at 1536-37; 29 U.S.C.A. § 1001a(a)(4)(A).

The MPPAA imposes withdrawal liability on an "employer" when it withdraws from a multi-employer plan. 29 U.S.C.A. § 1381(a). A withdrawal occurs when an employer ceases to have an obligation to contribute under a plan or ceases all operations covered under a plan. *See* 29 U.S.C.A. § 1383(a).[23] The MPPAA does not itself contain a definition of the word "employer." Title I of ERISA, however, contains a definition: "The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit

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[23] An employer partially withdraws from a plan when his contributions to a plan decline by 70%, or there is a partial cessation of his obligation to contribute. 29 U.S.C.A. § 1385(a).

plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C.A. § 1002(5). In *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980), the Supreme Court stated that "Title I definitions do not apply elsewhere in the Act of their own force, though they may otherwise reflect the meaning of the terms defined as used in other titles." *Id.* at 370 n. 14, 100 S.Ct. at 1731, n. 14.

The Second Circuit has concluded that the definition of employer under the MPPAA has been left to the courts. *Korea Shipping*, 880 F.2d at 1536-37. The *Korea Shipping* court held that the Title I definition of "employer" should apply to the MPPAA because the policies behind the MPPAA make the expansive Title I definition more appropriate than the common law definition, which looks for direct employer-employee relationships (e.g., direct supervision, direct payment). *Id.* at 1537. The Second Circuit approved of a definition of the term "employer" as " 'a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants.' " *Id.* (quoting district court). This definition looks for a "contributing obligor" rather than a common law employer.

The Second Circuit argued that the common law definition of employer would frustrate the purposes of the MPPAA by encouraging employers to insulate themselves from liability under the MPPAA by entering into agreements under which entities that were not direct employers of a plan's beneficiaries would make pension plan contributions. In such a scenario, the employers could effectively withdraw from a plan by terminating their relationships with the direct employer without incurring withdrawal liability. *Id.* at 1539-40. Given the Congressional policy of ensuring the financial stability of pension plans, the court concluded that "employer" in the MPPAA must include all parties that are obligated to contribute to a plan for the benefit of a plan's participants. *Id.* at 1537.

[13] The contributing obligor test drawn from Title I of ERISA furthers Congress's purposes in passing the MPPAA because it prevents a contributor to a plan from withdrawing

its support without covering its share of unfunded liabilities.[24] By sweeping in direct employers, indirect employers, intermediaries, and employer associations, the contributing obligor definition ensures that no employer can use intricate corporate structures to avoid withdrawal liablity. *See* ERISA section 3(5), 29 U.S.C.A. § 1002(5). We hold, therefore, that the contributing obligor definition drawn from Title I applies to the term "employer" in section 1381(a).

[14] CCC also argues that even if the contributing obligor definition does apply, CCC is not a contributing obligor. In *Korea Shipping*, the alleged "employers" were carriers that called at the port of New York and utilized stevedoring companies to load and unload their ships. The stevedoring companies, not the carriers, employed ILA labor. Under the master agreement and the local port agreement ("the GCA"), the carriers were obligated to pay tonnage assessments to the local employer association ("NYSA"), which, in turn, paid the assessments to the local port plan. *Korea Shipping*, 880 F.2d at 1534. Under the contributing obligor test, the court held that the carriers were employers subject to withdrawal liabiity. *Id.* at 1539.

The court rejected the carriers' claim that they were not obligated to contribute to the pension plan. The court relied on a provision in the GCA that parallels a similar provision in the JSP agreement.

> "[E]ach vessel carrier . . . shall be responsible for an assessment amount per ton on each ton of non-excepted cargo loaded or discharged in the Port of New York," . . . those assessments "shall be collected by the direct employer [the stevedores] from each of the carriers and shall be paid to NYSA for immediate transmittal to the NYSA-ILA Fringe Benefits Escrow Fund."

Id. The language in the JSP agreement is as follows:

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[24] The MPPAA calculates withdrawal liability on the basis of a party's prior contribution commitments, not on the number of employees. *See* 29 U.S.C.A.§ 1391(b)(2)(E)(ii), (b)(3), (b)(4)(D).

> Such tonnage assessment amounts shall be collected as necessary from the carrier by. . .[CCC] which shall pay out the shortfall payments required by this Agreement. . .[CCC] shall hold such amounts in interest bearing accounts or in appropriate investment accounts and shall pay out such amounts only for obligations under the JSP Program. . . .

JSP Agreement, Attachment B at 2.

CCC is clearly a contributing obligor. Under the JSP agreements, the carriers, through CCC, were obligated to pay money to the pension funds to cover shortfalls. That was the very purpose of forming JSPA, Inc., CCC's predecessor. The carriers, therefore, are subject to withdrawal liability through CCC.

CCC also argues that even under the contributing obligor test it is not subject to withdrawal liability because the obligation that triggers employer status is the promise to provide benefits, rather than the promise to provide contributions. This argument is meritless. The MPPAA imposes withdrawal liability when an employer ceases to have "an obligation to contribute" to a plan. 29 U.S.C.A. §§ 1383(a)(1), 1385(a). Also, withdrawal liability is calculated on the basis of the "contribution required to be made under [a] plan by the employer . . .," 29 U.S.C.A. § 1391(b)(2)(E)(ii), and not on the basis of the benefits that the employer promised to supply to plan participants. *See id.; see also* 29 U.S.C.A. §§ 1391(b)(3)(B), (b)(4)(D). The Second Circuit reached a similar conclusion in *Korea Shipping*. "Once the contributions are agreed upon and made, they become the focus by which the withdrawing contributor's share of the plan's unfunded vested benefits pursuant to 29 U.S.C.[A.] § 1391 is determined" *Korea Shipping*, 880 F.2d at 1540. The obligation of CCC to contribute to the local plans therefore provides the basis for imposing withdrawal liability upon CCC.

[15] CCC also argues that it was not a party to the local port plan and therefore had no obligation to contribute under the Mobile Plan. Because the local port contracts, the master contract, and the JSP agreement are "interrelated collective

bargaining agreements," *see* Part III, A, *supra*, CCC is obligated to contribute to the Mobile Plan. Moreover, even if CCC is not a direct party to the Mobile local port agreement, it still had an obligation to contribute under the JSP agreement. Under 29 U.S.C.A. § 1392, an "obligation to contribute" is "an obligation . . . arising—(1) under one or more collective bargaining (or related) agreements. . . ." The JSP agreement was a "related" agreement.[25] Accordingly, CCC is subject to withdrawal liability through its contractual obligations.[26]

2. *The District Court Correctly Held that CCC Withdrew from the Plan and Actually was Liable under 29 U.S.C.A. § 1381(a)*

[16] CCC contends that the only question that was before the district court was whether CCC is an "employer" under the MPPAA. The issue of liability, CCC argues, should have been

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[25] In reaching the conclusion that the JSP agreement was part of "interrelated collective bargaining agreements," the district court stated, "It simply cannot be contended that the JSP Agreement, which was specifically referred to in the Master Contracts, was neither itself the product of collective bargaining nor related to the collective bargaining agreement between [MSA] and the Mobile locals."

[26] In *Alspaugh v. JSP Agency, Inc.*, CCC settled a suit by the Mobile Plan for shortfall payments under the JSP program. These were the only payments that the Mobile Plan ever received from CCC. CCC now argues that because the plan's accounting records did not list CCC as an employer, but characterized payments from CCC as "settlement of lawsuit," CCC never had a contractual duty to contribute to the Mobile Plan. The settlement paid by CCC, however, supports the proposition that CCC had a contractual obligation to contribute to the Mobile Plan. The settlement concerned CCC's contractual obligation to make shortfall payments to the Mobile Plan.

CCC also argues that the Mobile Plan must show some change in position in reliance on the JSP payments before withdrawal liability can apply. The Second Circuit rejected this argument in *Korea Shipping*. "[W]ithdrawal liability is designed as a compensatory mechanism to counterbalance shrinkages in the contribution base of covered plans. . . . [And t]hus the Fund need not prove specific harm resulting from the withdrawals. . . ." *Korea Shipping*, 880 F.2d at 1539.

preserved for an arbitrator and should not have been resolved by the district court.

The MPPAA provides, "Any dispute between an employer and the plan sponsor of a multi-employer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration." 29 U.S.C.A. § 1401. Courts have held, however, that when a party seeks a determination from a court that it was never an employer under the MPPAA the court may rule on the issue. *See, e.g., Park South Hotel Corp. v. New York Hotel Trades Council*, 851 F.2d 578, 582 (2d Cir.1988) (arbitration not required where (1) case presents no factual issues and only questions of statutory interpretation, (2) parties agreed that arbitration was unnecessary, (3) the suit was filed before the period for seeking arbitration had run, and (4) judicial economy would not be served by remanding the case for arbitration); *Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241, 1253 (3d Cir. 1987) (citing *Dorn's Transp. v. Teamsters Pension Trust*, 787 F.2d 897, 903 (3d Cir. 1986) (arbitration not necessary in rare cases where (1) issue is not one on which arbitrator has expertise, (2) arbitration was not likely to moot further proceedings, and (3) arbitration would not help to develop factual record to assist the district court)).

In the instant case, the district court appropriately determined that CCC was an employer and that withdrawal had taken place. The issue of whether CCC was an employer was one of statutory interpretation in which an arbitrator would have no particular expertise. *Dorn's*, 787 F.2d at 903. The suit was filed before the period for initiating arbitration had run. *Park South Hotel*, 851 F.2d at 582. Because CCC was likely to appeal any adverse ruling by the arbitrator, judicial economy would not have been served by requiring arbitration. *Dorn's*, 787 F.2d at 903. And an arbitrator would not have helped to develop a factual record on the issues of statutory interpretation or on the issue of withdrawal because both parties agree that the JSP Program is ending. *Id.*

Once the court had determined that CCC was an employer within the meaning of 29 U.S.C.A. § 1381(a), the issue of whether

CCC had withdrawal liability was in effect decided. It is undisputed that the 1986 master agreement ended the JSP Program. Accordingly, the district court did not err in noting that the only remaining issue was the amount of CCC's liability and remanding that issue to the arbitrator. *See Central States Pension Fund v. 888 Corp.*, 813 F.2d 760, 767 (6th Cir.1987) (where parties dispute the proper amount of employer's withdrawal liability, the issue should be remanded to an arbitrator).

3. *Interim Payments by CCC*

[17] The Mobile Plan cross-appeals the district court's denial of the plan's motion for an order directing CCC to make interim payments to the plan while the parties pursue arbitration. In its March 21, 1989 order, the district court stated that CCC was "unquestionably obligated under 29 U.S.C.A. § 1401(d) to make interim payments. . . ." The court concluded, however, that because it had stayed arbitration pending resolution of CCC's employer status, it should not fault CCC for failing to make interim payments. The court then directed the parties to arbitrate the issue of interim payments.[27] In its May 5, 1989 order, the district court directed CCC to pay all overdue withdrawal payments, but did not refer the parties to the payment schedule in the Mobile Plan's December 21, 1987 letter.

The MPPAA requires an employer to make interim payments during the pendency of any dispute over withdrawal liability. *See* 29 U.S.C.A. §§ 1399(c)(2), and 1401(d). Section 1399(c)(2) provides:

> Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under

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[27] The district court did not explain why its order staying arbitration had, or should have had, the effect of relieving CCC of its duty to make interim payments pending arbitration under 29 U.S.C.A. §§ 1399(c)(2) and 1401(d). A stay of arbitration does not suspend the employer's duty to make interim payments, which, by definition, applies during the interim between demand by the plan administrator and the decision by the arbitrator or a court. *See* 29 U.S.C.A. § 1401(d).

> subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

Under 29 U.S.C.A. § 1401(d), "[p]ayments shall be made by an employer in accordance with the determinations made under this part [by the plan] until the arbitrator issues a final decision. . . ." This language is mandatory, and leaves the court with no discretion not to order interim payments. *See Pantry Pride, Inc. v. Retail Clerks Tri-State Pension Fund*, 747 F.2d 169, 173 (3d Cir.1984) (Hunter, J., dissenting).[28]

The court should have ordered CCC immediately to begin interim payments according to the Mobile Plan's December 21, 1987 letter. *See M. Hayes Lines, Inc. v. Centr. States Southeast and Southwest Areas Pension Fund*, 814 F.2d 297, 299, 301 (6th Cir.1987); 29 U.S.C.A. §§ 1399(c)(2) and 1401(d). These payments should continue until the dispute is resolved by the arbitrator or through judicial review. 29 U.S.C.A. § 1401(d).[29]

4. *Attorneys' Fees*

[18, 19] Finally, the Mobile Plan asserts that it is statutorily entitled to damages and attorneys' fees for the costs of this action.

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[28] To succeed on a claim for interim payments, a plan needs only to show that it complied with the MPPAA's procedural requirements: (1) determine that the employer has withdrawn from the multiemployer plan; (2) determine the amount of the employer's withdrawal liability; (3) notify the employer of the amount of liability and payment schedule; and (4) demand payment according to the schedule. *Bowers v. Transportes Navieros Ecuadorianos*, 719 F.Supp. 166 (S.D.N.Y. 1989); 29 U.S.C.A. §§ 1382, 1391(b)(1). The MPPAA scheme, which requires payment of withdrawal liability pending the resolution of any dispute, is consistent with due process.

[29] In its May 5, 1989 order, the district court directed CCC to "comply with 29 U.S.C. §§ 1399(c) and 1491(d) by paying all overdue withdrawal liability payments plus interest as calculated under the applicable regulation." At that time, the Mobile Plan also sought acceleration of all of CCC's withdrawal liability payments. This relief is unavailable under 29 CFR § 2644.2(c), which does not allow acceleration when a party has sought arbitration. *ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879, 882 (2d Cir.1988).

Under section 1132(g)(2), when a plan sponsor prevails in an action to enforce delinquent payments, the court must award the plan sponsor the following:

> "(A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of –
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages . . . [and]
>
> (D) reasonable attorneys' fees and costs of the action, to be paid by the defendants. . . ."

29 U.S.C.A. § 1132(g)(2). An award of attorneys' fees in a delinquent payment case is mandatory under the statute. *See United Retail and Wholesale Employees v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 134-35 (3d Cir.1986), *aff'd by equally divided court*, 481 U.S. 735, 107 S.Ct. 2171, 95 L.Ed.2d 692 (1987); *Plumbers' Pension Fund Local 130 v. Domas Mech. Contractors, Inc.*, 778 F.2d 1266, 1271 (7th Cir. 1985); *Operating Engineers Pension Trust v. Reed*, 726 F.2d 513, 514 (9th Cir.1985) (Kennedy, J.); *see also Nachwalter v. Christie*, 805 F.2d 956, 961 (11th Cir.1986) (citing *Plumber's Pension Fund*, 778 F.2d at 1271). Under the statute, the district court must award the Mobile Plan the unpaid withdrawal payments, double interest[30] on those contributions, and attorneys' fees. *See United Retail and Wholesale*, 787 F.2d at 134-35; 29 U.S.C.A. § 1132(g)(2).[31]

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[30] The plan has no liquidated damages provision. Accordingly, the plan should receive interest on the unpaid contributions twice: once under § 1132(g)(2)(B), and once under § 1132(g)(2)(C)(i).

[31] CCC argues that the Mobile Plan waived its right to attorneys' fees, interest, and damages because the Mobile Plan failed to file a request for attorneys' fees within ten days prior to the expiration of the period for filing an appeal from the district court's March 21, 1989 order dismissing CCC's complaint.

(Footnote continued)

IV. CONCLUSION

For the foregoing reasons, we:

AFFIRM the district court's holding in the surplus case that the CCC funds must benefit the local plans;

REVERSE the district court's damages award in the surplus case and REMAND the case for trial on the issue of damages;

AFFIRM the district court's holding in the withdrawal liability case that CCC is an "employer" within the meaning of 29 U.S.C.A. § 1381(a);

AFFIRM the district court's holding that CCC is liable for withdrawal liability, and direct the district court to send the issue of the amount of liability to arbitration pursuant to 29 U.S.C.A. § 1401;

REVERSE the district court's holding that CCC does not have to begin interim payments pending litigation of its withdrawal liability and REMAND with directions to order CCC to begin interim payments in accordance with the schedule set forth in the Mobile Plan's December 21, 1987 letter; and

REVERSE the district court's holding that the Mobile Plan is not entitled to liquidated damages and attorneys' fees, and direct the district court to award the Mobile Plan (1) the unpaid withdrawal payments, and, upon proper motion, (2)(a) double interest on those contributions, and (b) attorneys' fees.

See S.D.Ala.R. 28 (upon final judgment or partial judgment made final by the court pursuant to Fed.R.Civ.P. 54(b), a party must file a motion for attorney's fees at least 10 days prior to expiration of the 30 days provided for in Fed.R.App.P. 4(a) for filing a notice of appeal). The March 21, 1989 order, however, was ambiguous as to the disposition of the Mobile Plan's counterclaim for payment of withdrawal liability and interest. The judgment entered with the order, moreover, did not mention the Mobile Plan's counterclaim. This action by the district court was not final and, therefore, did not begin S.D.Ala.R. 28's clock running.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MOBILE STEAMSHIP ASSOCIATION, INC., ET AL,)
) CIVIL ACTION
Plaintiffs,)
v.) No. 87-0553-B-M
)
CARRIERS CONTAINER COUNCIL, INC., as successor to JSP AGENCY, INC.,)
)
Defendant.

JUDGMENT

On this date, the Court granted the motion for partial summary judgment filed by the plaintiffs in this case, and directed the entry of final judgment under Rule 54(b), Fed.R.Civ.P. It is therefore,

ORDERED, ADJUDGED and DECREED that final judgment is entered in favor of plaintiffs and against defendant Carriers Container Council, Inc., as successor to JSP Agency, Inc. ("JSPA") as follows:

1. Carriers Container Corporation shall pay to the MSSA-ILA Pension Plan, the MSSA-ILA Welfare Plan and the MSSA-ILA Local 1985 Maintenance Employees' Pension Plan the total amount of $4,218,000, together with interest thereon from the date of this judgment;

2. Carriers Container Corporation shall pay to the PMTA-ILA Pension Fund, the PMTA-ILA Welfare Fund, and the PMTA-ILA Supplemental Unemployment Compensation Benefit Plan, the total amount of $15,276,000, together with interest thereon from the date of this judgment;

3. Pending payment of the amounts specified in this judgment, Carriers Container corporation, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, are enjoined from paying or distributing any funds collected under the Job Security Program, including any interest earned thereon, to any person or entity, including but not limited to (a) utilizing any such funds for any operating expenses of Carriers Container Corporation that are unrelated to the administration of the Job Security Program, (b) refunding any such funds to the members of Carriers Container Corporation, or otherwise allowing those members to utilize such funds to pay the members' financial obligations, (c) implementing Carriers Container Corporation's "Credit Memo Procedures," or any other procedures designed to distribute such funds.

4. The costs of this action are taxed against defendant Carriers Container Council, Inc.

5. Attorneys for the plaintiffs are entitled to collect reasonable attorney's fees from the funds awarded to the plaintiff according to this judgment.

DONE this the 22nd day of June, 1989.

/s/
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED
ON DOCKET

Date June 23, 1989
JOHN V. O'BRIEN, CLERK

U.S. DISTRICT COURT SOU. DIST. ALA.
FILED AND ENTERED THIS THE 22nd DAY OF JUNE 1989, JUDGMENT ENTRY NO. 6262-C
JOHN V. O'BRIEN, CLERK
/s/Lawrence P. Strehan
DEPUTY CLERK (June 23, 1989)

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MOBILE STEAMSHIP ASSOCIATION, INC., ET AL,

Plaintiffs,

v.

CARRIERS CONTAINER COUNCIL, INC., as successor to JSP AGENCY, INC.,

Defendant.

) CIVIL ACTION

) No. 87-0553-B-M

MEMORANDUM OPINION

These consolidated cases under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 are before the Court on the parties' motions for summary judgment in *Mobile Steamship Association, Inc. v. Carriers Container Council, Inc., as successor to JSP Agency, Inc.*, Civil Action No. 87-0553-B-M, which was filed in this Court ("Mobile II"), and *Paylor v. JSP Agency, Inc.*, which was originally filed as Civil Action No. 88-3272 in the Eastern District of Pennsylvania ("Philadelphia II") then was transferred to this Court and consolidated with Mobile II.

Plaintiffs claim that $57 million in surplus funds resulting from employer contributions to the collectively bargained "JSP" must be distributed to the "employee benefit plans" covering longshore employees in the ports of Mobile and Philadelphia. Defendants contend the surplus is "general corporate funds" and can be used by Carriers Container Corporation ("JSPA") as it sees fit, for refund to the carriers and administrative costs of the JSP.

DETERMINATION OF UNCONTROVERTED FACTS

1. The plaintiffs in Mobile II are the Mobile Steamship Association, Inc. ("MSSA"); Atlantic & Gulf Stevedores, Cooper/T. Smith Corporation, Murray Stevedoring Company Inc., Page Stevedore Company of Mobile Inc., Ryan-Walsh Stevedoring Company Inc., and Strachan Shipping Company (collectively the "Mobile Employers"); ILA Local 410, ILA Local 1410-1, ILA Local 1459, and ILA Local 1985 (collectively "Mobile ILA Locals"); the Trustees of the MSSA-ILA Pension and Welfare Plans and the Trustees of the MSSAS-ILA Local 1985, Maintenance Employees' Pension Plan (the "Mobile Trustees" and/or the "Mobile Plans"). MSSA is an employer association whose members (including the Mobile Employers) are stevedores, steamship agents and other direct employers of ILA Labor in the Port of Mobile. The Mobile ILA Locals are local unions in the Port of Mobile that are affiliated with the ILA. At relevant times, MSSA was the collective bargaining agent of its employer-members and, in that capacity, was a party to successive collective bargaining agreements with the ILA (on a national level) and with the Mobile ILA Locals (on a local level). Under the successive local collective bargaining agreements, MSSA and the Mobile ILA Locals established and maintained the Mobile Plans, which are jointly-administered, labor-management "employee benefit plans" that provide pension and welfare (medical) benefits to ILA Labor in the Port of Mobile.

2. The plaintiffs in Philadelphia II are the Trustees of the Philadelphia Maritime Trade Association ("PMTA") – ILA Pension Fund, the Trustees of the PMTA – ILA Welfare Fund, and the Trustees of the PMTA – ILA Supplemental Unemployment Compensation Benefit or "SUB" Plan (the "Philadelphia Trustees" and/or the "Philadelphia Plans"). The Philadelphia Plans are jointly administered, labor-management "employee benefit plans" providing retirement, welfare and supplemental unemployment benefits to ILA Labor in the Port of Philadelphia. Like the Mobile Plans, the Philadelphia Plans were established and maintained under successive collective bargaining

agreements between PMTA (the employer bargaining association in Philadelphia) and the ILA Local Unions in Philadelphia.

3. Carriers Container Council, Inc. as successor to JSP Agency, Inc. ("JSPA"), is the defendant in both cases. JSPA is a Delaware not-for-profit membership corporation with its principal place of business in New York. Formed in December 1977 to implement and administer the collectively-bargained JSP, ("JSP"), JSPA' s membership was comprised of maritime cargo carriers that called on Atlantic and Gulf Coast seaports from Maine to Texas ("carriers"). JSPA's stated purpose was to implement and carry out provisions of the JSP Agreements entered into by and between the ILA and its local affiliates and certain carriers. In 1985, JSPA amended its bylaws to empower the corporation to act as the collective bargaining agent of its carrier members with respect to the Job Security Program. In June 1987, JSPA merged with the Carriers Container Council, an unincorporated association of maritime cargo carriers that administered the "Containerization" provisions of the carriers' collective bargaining agreements with the ILA. At that time, JSPA's corporate name was changed to "Carriers Container Council, Inc." ("CCC"), and the membership lists of JSPA and Carriers Container Council were merged.

4. The International Longshoremen's Association, AFL-CIO, ("ILA") is a nominal defendant in Mobile II, against whom the plaintiffs do not assert any claims. Under successive collective bargaining agreements in effect from October 1, 1977 through September 30, 1986, the carriers utilized ILA Labor to perform the work of loading and unloading the carriers' vessels at those ports.

5. The JSP was created and maintained under successive collective bargaining agreements covering ILA Labor at Atlantic and Gulf Coast seaports from October 1, 1977 through September 30, 1986. During that time, collective bargaining in the longshore industry took place on two levels. The first was national bargaining involving the ILA, the carriers and the employer associations representing direct employers in ports from

Maine to Texas (MSSA and PMTA, for example). Those negotiations resulted in both a "Master Agreement" on "seven master contract issues" and a separate JSP Agreement, both of which applied to all ports. The second level was local negotiations, in which ILA local unions in a particular port negotiated with the employer association in that port on terms and conditions of employment applicable only to that port. The collective bargaining agreements in the longshore industry thus encompassed the Master Agreement and the JSP Agreement on the national level, and the local collective bargaining agreements at each port on the local level.

6. In September 1977, negotiations on the national level broke down over the issue of "job security" for ILA labor. The ILA demanded the creation of a "master fund" to protect the Local Port Plans from the effects of automation in the maritime industry, particularly "containerization". The ILA recognized that, as a result of containerization, the carriers could bypass ports that previously had been cargo-producing or cargo-receiving areas, and could centralize their containerized operations at highly-mechanized ports. As a consequence, the amount of cargo loaded and unloaded by ILA labor at certain ports would dramatically decrease, as would the number of man-hours of ILA Labor required to perform that work. With the exception of New York, the pension and welfare plans at ports from Maine to Texas, including Mobile and Philadelphia, were funded by means of contributions based upon the number of man-hours of work performed by ILA labor. Thus, a reduction in man-hours would also result in a reduction of contributions to the Local Port Plans.

7. During the 1977 national negotiations, an impasse developed over the issue of "job security", resulting in a strike against containerized carriers at all ports from Maine to Texas. The strike was not resolved until the carriers negotiated directly with the ILA, and agreed to the first JSP Agreement in November 1977 ("1977 JSP Agreement"). The 1977 JSP Agreement resolved the ILA's demand for a master fund to protect the Local Port Plans and thereby ended the strike. On the same date the 1977 JSP Agreement was executed, the 1977 Master

Agreement was also executed by the ILA and the various employer associations. Shortly thereafter, the terms of the 1977 Master Agreement were adopted in collective bargaining agreements between the ILA and various other employer associations, including MSSA, and JSPA was formed by the carriers to administer the JSP.

8. The 1977 Master Agreement covered seven master contract issues", including wage rates and contribution rates to the Local Port Plans. Paragraph 6 of the Agreement captioned "Containerization" stated: "As set forth in appended [Containerization] Agreement and appended JSP Program," the "Containerization Agreement" and the 1977 JSP Agreement were incorporated to the 1977 Master Agreement. Under the Containerization Agreement, the carriers paid "container royalty payments" based upon the amount of cargo loaded and unloaded by ILA labor at covered ports. Those royalty payments were used to provide "supplemental cash payments" to employees covered under local collective bargaining agreements, and to provide additional funding for local fringe benefits plans, as determined on a port by port basis. Also under the Containerization Agreement,

> management [the local employer associations and the employer members of such associations] agree[d] to participate in the attached JSP Program, in order to preserve the job security of ILA employees in all ports covered by . . . the JSP Agreement.

9. The 1977 JSP Agreement was signed by the ILA, and by the carriers, who signed under the caption: ". . . On The Seven Master Contract Issues And On The JSP Agreement." Under the 1977 JSP Agreement, the carriers recognized the ILA as the collective bargaining agent of employees "employed to load and unload the carriers' ships" in ports from Maine to Texas, and acknowledged that the carriers had "bargained with the ILA on the issue of Job Security" for those employees. Paragraph 1(b) of the 1977 JSP Agreement provided:

> (b) **Purpose of Job Security Program**: The new Job Security Program (JSP) concept is to be undertaken

> by the Carriers in order to protect and preserve the job security of employees represented by the ILA in each of the ports listed in Appendix A [including the ports of Mobile and Philadelphia] and to protect the local port plans described in Paragraph 2 hereof [i.e., guaranteed annual income or "GAI" plans, pension and welfare plans] from shortfalls which may take place after October 1, 1977.

While the agreement did not expressly provide how the JSP would "protect and preserve the job security of employees represented by the ILA", the agreement did contain provisions related to the protection of the Local Port Plans from "shortfalls":

> (4) **Liability for Shortfalls:** The liability for shortfall provided for in this JSP Agreement is to be undertaken by the Carriers in accordance with the assessment method set forth in Appendix B ['JSP Tonnage Assessment"]. . . .The above assessment shall be collected, as necessary, from the Carriers by the administrative agency created by the Carriers which shall pay out the shortfall payments required by this agreement.

The Agreement also imposed specific obligations upon Local Port Plans and upon the employer associations in those ports covered by the JSP. Finally, the Agreement stated that, if a carrier did not subscribe to the agreement and thereby obligate itself to pay the tonnage assessment on all cargo loaded and unloaded by ILA labor, the ILA had the right "not to work on the loading and discharging of [the Carrier's] ships or any work ancillary thereto".

10. The "JSP Tonnage Assessment," Appendix B to the 1977 JSP Agreement, obligated the carriers to pay a specified amount for each ton of cargo loaded or unloaded by ILA Labor at covered ports, and further provided:

> Such tonnage assessment amounts shall be collected as necessary from the Carriers by the administrative agency (to be known as the JSP Agency) created by

> the Carriers, which shall pay out the shortfall payments required by this Agreement. . . . The JSP Agency shall . . . *pay out such amounts only for obligations under the JSP Program and the expenses of administration thereof.* (emphasis supplied)

11. The 1977 JSP Agreement was signed only by the ILA and the carriers. However, paragraph 6 of the 1977 Master Agreement incorporated the JSP and the Containerization Agreement as part of the Master Agreement, and, under the Containerization Agreement, the local employer associations specifically "agreed to participate" in the JSP. Moreover, to participate in the JSP, the local employer associations and the ILA local unions at each "covered port" (i.e., those ports listed in "Appendix A" to the JSP Agreement) were required to include the JSP in their collective bargaining agreements. To that end, the local agreements in the ports of Mobile and Philadelphia incorporated the successive JSP Agreements.

12. Neither the 1977 JSP Agreement (including the JSP Tonnage Assessment), the 1977 Master Agreement nor the local collective bargaining agreements contained any provision specifically dealing with the distribution of "surplus" JSP funds after payment of the Local Port Plans' "shortfall" claims.

13. The JSP was continued without relevant change in the 1980 JSP Agreement and the 1980 Master Agreement. The 1980 Master Agreement once again included the "appended" Containerization Agreement and the "appended JSP Program".

14. The carriers and the ILA did not execute a separate "JSP Agreement" for the 1983-86. Nevertheless, the Court finds that the JSP was continued during that time, which was basically continued without relevant change for the 1983-1986 period.[1]

---

[1] While there was no separate JSP Agreement for 1983-1986, the position of JSPA and its carrier members was that the JSP was comprised of the terms of the 1980 JSP Agreement, as modified by paragraph 6 of the 1983 Master Agreement. Indeed, in October 1983, JSPA's Board of Directors took steps to implement the changes effected by ¶6 of the 1983 Master Agreement.

15. The Court finds that the JSP was the product of the interrelated collective bargaining agreements, which included the plaintiffs herein, covering ILA Labor at all ports from Maine to Texas from the program's inception in 1977 until its termination in 1986. The parties to those collective bargaining agreements were parties to the JSP, with a direct contractual interest in ensuring the proper use and distribution of JSP funds.

16. Prior to the negotiations that led to the termination of the JSP effective October 1, 1986, the distribution of "surplus" funds if the Program were discontinued was not discussed by the parties nor was it dealt with in either the collective bargaining agreements or the JSP Agreements. During the time the JSP was in operation, the parties simply did not foresee the substantial surplus that ultimately remained after the Program was terminated and JSPA disposed of the Local Port Plans' pending shortfall claims. When the JSP terminated in 1986, the Local Port Plans' shortfall claims under the Program actually exceeded the amount of money on hand to pay those claims. Only after JSPA achieved a favorable settlement of all pending shortfall claims in May 1988 (with the exception of Philadelphia I) did a $57 million surplus appear.

There were 21 shortfall claims filed by Local Port Plans under the JSP totalling approximately $163,700,000. Before the May 1988 settlement, JSPA paid only $53,863,312 on those claims, or 32.9% of the amount claimed. Only $3,414,791 paid to the Port of New York was paid without litigation. Even after the 1988 settlement, JSPA had paid only $75,713,312 for shortfall claims, or approximately 46% of the amount claimed. In the May 1988 settlement, JSPA paid $30,500,000 to five ports that did not have pending shortfall claims as a distribution of "surplus" JSP funds, primarily consisting of an additional $27,500,000 to the Port of New York.

17. When JSPA originally denied the Mobile Plans' claim for shortfall assistance for 1977-80 and 1980-83, the Mobile Trustees filed the lawsuit referred to as Mobile I. The case was settled, and under a Settlement Agreement between JSPA and the Mobile Trustees, JSPA ultimately paid the Mobile Plans $5,629,027.

18. Mobile I was not settled, however, until after a dispute arose as to the scope of the "releases" required under the Settlement Agreement. Judge Emmett Cox conducted a hearing on that issue, and ruled that the Settlement Agreement did not contemplate the settlement of any claims other than the Mobile Plans' "shortfall" claims. Judge Cox concluded that:

> [t]here is nothing in the record or the Settlement Agreement itself to indicate that the parties drafted the disputed language [in the Settlement Agreement] with the pending termination of the JSP Program in mind, and it is therefore unreasonable to conclude that the parties intended to release JSPA from potential claims of the kind asserted in the *Mobile Steamship* case [i.e., the instant lawsuit, Mobile II]

JSPA later contended that the Settlement agreement in Mobile I barred the withdrawal liability claim asserted by the MSA-ILA Pension Plan in Mobile III. Based upon the Court's decision in Mobile I, Judge W. B. Hand in Mobile III expressly rejected that contention:

> [P]laintiff additionally alleges that defendants [MSA/ILA Pension Plan] are barred from asserting any further claims against [JSPA] because of the Settlement Agreement reached in [Mobile I]. It is understandable that [JSPA] chose not to argue the claim in its motion for summary judgment. Judge Cox made abundantly clear in his Memorandum Opinion of May 6, 1988, that the [Mobile I] Settlement Agreement addressed only "shortfall" in contributions from October 1, 1977 to September 30, 1986. The Settlement Agreement does not, therefore, present a bar relative to [the MSA/ILA Pension Plan's] claims for withdrawal liability in this case.

JSPA's contention that the Settlement Agreement in Mobile I precludes recovery in this action, is likewise without merit.

19. The Philadelphia Plans' claims for shortfall assistance for 1977-80 and 1980-83 were ultimately resolved in a "JSP Amendatory Agreement" between JSPA, PMTA and the ILA. The

agreement was approved by the U.S. District Court for the Eastern District of Pennsylvania in 1981, under which JSPA (although not a defendant in the litigation) paid a total of $20,345,209 to the Philadelphia Plans.

20. The economic conditions that gave rise to the JSP (i.e., the decline in contributions to the Local Port Plans wrought by containerization and a consequent change in shipping patterns) still exist, and the Mobile Plans and the Philadelphia Plans have continued to experience financial problems as a result of those conditions. Thus, the number of hours worked by ILA Labor in the Port of Mobile averaged 989,023 hours each year for the three-year period immediately preceding the creation of the JSP in 1977. For the year ending September 30, 1987, the ILA Labor worked only 292,622 hours, and for the year ending September 30, 1988, the total was 416,553.5 hours. As a consequence, the MSSA-ILA Pension Plan has not increased retiree benefits since 1979 and, since 1977, the Pension Plan's unfunded liability has increased. During the same period, the MSSA-ILA Welfare Plan has had to eliminate certain medical benefits and reduce others. The Philadelphia Plans have suffered similar problems. Throughout the life of the Job Security Program, the number of hours worked by ILA Labor (and consequently the amount of contributions to the Plans) steadily declined. As of January 1, 1988, the PMTA-ILA Pension Fund had unfunded liability of $58,151,300 and for the past eight years, neither the Pension Plan nor the PMTA-ILA Welfare Plan has been able to increase benefits. Additionally, the Welfare Plan has been required to impose stricter eligibility requirements to meet increasing costs, and has had to eliminate certain benefits.

21. In 1986, negotiations on the national level did not include many of the port associations that previously participated in the 1977 and 1980 national negotiations, and, on September 5, 1986, the ILA entered into a collective bargaining agreement with the New York Shipping Association (NYSA), The Boston Shipping Association, JSPA and the Carriers Container Council ("1986 Agreement"). MSSA, PMTA, the Mobile ILA Locals, the Philadelphia ILA Locals, the Mobile Plans and the Philadelphia Plans did not participate in the negotiations that lead to the

1986 Agreement, and the Agreement admittedly bound only those parties who were signatory to the Agreement. Paragraph 8 of that 1986 Agreement stated:

JSP

> The Job Security Program shall be discontinued as of October 1, 1986, except for the purpose of meeting any obligations of the Fund under the existing agreement. *Any surplus*, after all such obligations have been satisfied, *shall be discussed* with the ILA.

(emphasis supplied) This was the first reference to JSP "surplus" funds in any collective bargaining agreement.

22. JSPA took the position that any surplus in the JSP constituted general corporate funds of JSPA that could be used as JSPA deemed appropriate. In early 1988, CCC, the successor to JSPA, unilaterally determined how much of the surplus would be refunded to the carriers via a "Credit Memo Procedure" ($37 million), and how much would be retained by CCC for future administrative expenses (approximately $20 million). CCC then advised the ILA that the balance would be made available to settle the Local Port Plans' claims against the JSP, that the ILA should contact the Local Port Plans to determine how that money would be divided, and that, if CCC was unable to achieve a comprehensive settlement, the Local Port Plans would face "a protracted court battle" to obtain any payment on pending shortfall claims. The ILA ultimately procured agreement from all ports, with the exception of Mobile and Philadelphia, and, on May 24, 1988, the ILA and CCC entered into agreement to effect the settlement ("1988 Settlement Agreement").

23. The ILA undertook to procure settlement of the Local Port Plans' pending shortfall claims in exchange for the "payments to be made" under the Agreement. The 1988 Settlement Agreement did not bind the Local Port Plans or the local employer associations unless those entities accepted the Agreement. The Local Port Plans, local ILA unions and the local port associations in Mobile and Philadelphia did not, hence this litigation.

24. Under the 1988 Settlement Agreement, CCC paid only $21,850,000 to settle $63,228,000 in pending shortfall claims from six ports. CCC also agreed to distribute $30,500,000 of "surplus" JSP funds to five ports that did not have pending shortfall claims.

New York	$27,500,000
Boston	$ 1,000,000
Miami	$ 1,000,000
Tampa	$ 500,000
Wilmington (NC)	$ 500,000

25. As the successive collective bargaining agreements giving rise to the JSP did not expressly deal with the distribution of surplus funds after termination of the Program, the Court must consider extrinsic evidence of the parties intentions in regard thereto. During the time the JSP was in operation, the parties (primarily JSPA), variously characterized the Program as a "trust fund", an "insurance" program to protect the Local Port Plans," an "escrow or feeder fund", employer "contributions" to the Local Port Plans, and a negotiated benefit intended as "compensation" for ILA Labor. JSPA never characterized JSP funds as "general corporate funds" while the Program was still in operation.

26. The foregoing characterizations of the JSP by the parties during the time the Program was in operation clearly supports the conclusion that all JSP funds were intended to benefit the Local Port Plans, and that any "surplus" funds must be used for that purpose. Direct evidence of the parties' manifested intent on the specific issue (i.e., the intended distribution of surplus funds) is, however, sparse. None of the collective bargaining agreements between the parties addresses the distribution of JSP surplus funds if the Program were discontinued, and the parties did not discuss that issue during the time the JSP was in operation; however, the distribution of $30,500,000 by CCC as surplus to New York and other ports after the termination of the JSP, is particularly relevant to the inquiry. While CCC now contends that the Carriers intended JSP funds to be CCC's "general corporate funds", subject only to payment of shortfall

claims under the JSP Agreements, no evidence in the record suggests that the carriers or CCC manifested that intent in any way before the negotiations that led to the termination of the Program. The deposition testimony of ILA Vice President Buddy Raspberry is, however, particularly revealing in this regard.

BY MR. MYRICK:

> Q: [D]o you recall me asking you if your understanding was that JSPA could use surplus JSP funds only to benefit the Local Port Plans and for no other purpose?
>
> A: I told you the money was supposed to be used to benefit the plans.
>
> Q: In fact, when I asked you that question didn't you answer, "absolutely"?
>
> A: Yes, I sure did.
>
> Q: [D]o you recall me asking whether your understanding was that any surplus Job Security Program funds should be paid to the Local Port Plans, and your responding, "absolutely, and if I have anything to do with it, that's where the money will go"?
>
> A: Absolutely right.
>
> Q: Is that where the money is going to go?
>
> A: Well, it was later on, after I talked to you [in February or March 1988], . . . and I told you that something had changed, . . . and that was that [the ILA] had a Board meeting and as per [the 1986 Agreement] we had agreed to do something different than that.

* * *

> Q: Did that vote change your understanding of how Job Security Program surplus funds could be used?
>
> A: Well, because the contract said that — prior to that time nothing had been said about what was going to be done [with any surplus]. It [the 1986 Agreement] just said that it would be decided by the ILA and the Carriers as to what was to be done with that money if there was any left over. I don't think anybody anticipated any being left over . . . .
>
> And then they came with the, I guess you could style as a settlement, a percentage to all ports making claims, because there was not enough money in there to pay to all the ports that made claims.

27. The "Findings of Fact, Conclusions of Law and Order" entered by Judge Hand in Mobile III (*supra*, n.1) bear directly upon several issues in this case. In Mobile III, the MSA-ILA Pension Plan sought to recover withdrawal liability from JSPA under ERISA's Multi-Employer Pension Plan Amendments, 29 U.S.C. § 1401 et seq. ("MPPAA"), based upon the shortfall payments the Pension Plan received as a result of the settlement of Mobile I (i.e., the shortfall litigation). Judge Hand concluded that, under MPPAA, JSPA was an "employer" subject to withdrawal liability.

28. In reaching his conclusion, Judge Hand found that the obligation of JSPA and its carrier members to contribute to the Local Port Plans was based upon the "interrelated collective bargaining agreements" between the parties, i.e., the local collective bargaining agreements between MSSA (on behalf of its employer members) and the Mobile ILA Locals, the successive Master Agreements and the successive JSP Agreements.[2]

> It simply cannot be contended that the JSP Agreement, which was specifically referred to the Master

---

[2] The Court cited 29 U.S.C. § 1392(a)(1), which provides that "the term 'obligation to contribute' means an obligation to contribute arising . . . under one or more collective bargaining (or related) agreements".

> Contracts, was neither itself the product of collective bargaining, nor related to the collective bargaining agreement between MSSA and the Mobile locals.

(*supra*, Mobile III at 22-23) The Court also held that the carriers were "employers" of ILA Labor, that the carriers' payments to the JSP were "compensation" for ILA Labor and were "contributions" to the Local Port Plans, and that JSPA's shortfall payments to the Local Port Plans were, therefore, employer contributions to the Plans. While the Court's specific holding was that the "shortfall" payments made to the MSA/ILA Pension Plan under the JSP Agreement were "contributions" for the purpose of MPPAA, it was the carriers' "contributions" that were paid into the JSP fund, which served as an "escrow" or "feeder" fund holding those contributions for distribution to the Local Port Plans.

CONCLUSIONS OF LAW

The Court has jurisdiction over this action under § 301 of LMRA, 29 U.S.C. § 185, as well as under 28 U.S.C. § 1337 and § 1331.

2. Section 301 of LMRA not only grants federal courts jurisdiction to enforce collective bargaining agreements, it also authorizes federal courts to fashion a body of federal substantive law in cases asserting rights under collective bargaining agreements, *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972, 980-81 (1957).

3. Whether CCC is contractually obligated to pay surplus JSP funds to the Local Port Plans depends upon the intent of the parties to collective bargaining agreements. Although the interpretation of collective bargaining agreements under § 301 of LMRA is governed by substantive federal law, traditional rules of contract interpretation apply to the extent that those rules are consistent with federal labor laws and policies. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 548, 11 L.Ed.2d 898, 904, 84 St.Ct. 909 (1964); *International United Automobile*,

Aerospace and Agricultural Workers of America Union v. Yard-Man Inc., 716 F.2d 1476, 1479 (6th Cir. 1983), cert. denied 465 U.S. 1007. To determine the parties' intent, this Court has looked at the language of the collective bargaining agreements for clear manifestations of intent and interpreted each provision in the agreement as part of an integrated whole. *Kellogg Co. v. NLRB*, 457 F.2d 519 (6th Cir. 1972) cert. denied 409 U.S. 850; *International United Automobile Aerospace and Agricultural Workers of America Union v. Yard-Man, Inc., supra.* While courts do recognize the parol evidence rule in construing collective bargaining agreements, the intended meaning of even the most explicit language in a collective bargaining agreement can generally be understood only in light of the context giving rise to the agreement. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 570, 80 S.Ct. 1343, 1364, 4 L.Ed.2d 1403 (1960); *Randall v. Lodge No. 1076 International Association of Machinists and Aerospace Workers*, 648 F.2d 462 (7th Cir. 1981); *Mioni v. Bessemer Cement Com.*, 6 Employee Benefit Cases 2677 (W.D. Pa. 1985). As the court recognized in *Mohr v. Metro East Mfg. Co.*, 711 F.2d 69, 72 (7th Cir. 1983):

> [I]t is not the purpose of industry-wide collective bargaining to erase all differences in labor relations within the industry. This is not to say that the labor relations setting makes the parol evidence rule inapposite, but only that in deciding whether the premise for applying the rule to a particular contract is present — i.e., that the written agreement or agreements were intended to be a complete expression of the agreement between the [parties] — sensitivity to context is required.

Thus, as the language in the collective bargaining agreements does not resolve the issue, which it does not in this case, the Court must look to extrinsic evidence to aid in its construction to determine the objective manifested intent of the parties. *Fabrica Italiana Lavorazione Meterie Organiche, S.A.S. v. Kaiser Aluminum & Chemical Corp.*, 684 F.2d 776, 780 (11th Cir. 1982); *Lovelace v. Eastern Air Lines, Inc.*, 681 F.2d 1272 (11th cir. 1982).

4. The Court concludes that the JSP was created and maintained under the interrelated collective bargaining agreements involving the ILA, the carriers (JSPA & CCC), the employer associations and the ILA local unions. Consequently, each of those entities is a part to the JSP. The conclusion that the employer associations and the ILA local unions are parties to the JSP disposes of CCC's contention that MSSA and the Mobile ILA Locals lack standing to maintain this action. See e.g., *Ketcher v. Sheet Metal Workers Intern. Ass'n*, 115 F.Supp. 802 (E.D. Ark. 1953) (both employer association and individual employer members had standing to assert a § 301 LMRA claim under a collective bargaining agreement).

5. The express language of the successive JSP Agreements offer little guidance as to the intended distribution of surplus funds upon termination of the Program. The agreements state that the "purpose of [the] Job Security Program" was twofold: (1) to protect and preserve the job security of employees represented by the ILA in each covered port, and (ii) to protect the Local Port Plans from shortfalls occurring after October 1, 1977.[3] While the JSP Agreements specify two distinct purposes, only the "shortfall" protection is defined in the Agreement. The provisions providing for the protection of the "job security" of ILA Labor is not otherwise explained. As noted, the JSP Agreements state that the JSP will protect Local Port Plans from shortfalls occurring "after" a specified date; there is no express cut-off on that protection. The "JSP Tonnage Assessment", on the other hand, expressly limits payment of the tonnage assessment to the three-year contract term:

> The following tonnage assessment method for the three-year period ending September 30, 1980 is hereby agreed to as an integral part of [the] collectively-bargained JSP Program.

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[3] See 1977 JSP Agreement ¶ 1(b), (PX 1.1). The 1980 JSP Agreement contained the same provisions, and protected the Local Port Plans from shortfalls occurring "after October 1, 1980." See 1980 JSP Agreement ¶ 1(b), (PX 1.3). There was no separate document for the 1983 JSP Agreement, but paragraph 6 of the 1983 Master Agreement specified that the "JSP Program shall be updated and extended by the Carriers."

While the "JSP Tonnage Assessment" thus makes clear the carriers' obligation to fund the JSP did not extend beyond the three-year contract term, nothing in the JSP Agreement supports the conclusion that funds already contributed could be refunded to the carriers upon termination of the Program. Indeed, paragraph 1(d) of the "JSP Tonnage Assessment" indicates to the contrary:

> [JSPA] shall hold such amounts in interest bearing accounts or in appropriate investment accounts and shall pay out such amounts *only* for obligations under the JSP Program and the expenses of administration thereof.

(emphasis supplied).

6. CCC relies upon the separate paragraph in the JSP Agreements specifying that each agreement had a three-year "term". It is clear, however, that the parties to a collective bargaining agreement may provide for obligations (such as the use of surplus funds to benefit the Local Port Plans) that survive termination of the collective bargaining agreement. See *John Wiley & Sons v. Livingston*, 376 U.S. 543, 548, 11 L.Ed.2d 898, 904, 84 S.Ct. 1914, 1917 (1964); *Intern. Union, U.A.W. v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983), cert. denied 104 S.Ct. 1002 (1984). A provision related solely to the term of the JSP Agreement has little bearing on the subsequent use of the surplus JSP funds. Even though the ILA and the carriers could terminate the JSP at the end of the contract term and, as stated in the "JSP Tonnage Assessment", thereby terminate the carriers' obligation to make future contributions, under similar circumstances, courts have held that general termination clauses in collective bargaining agreements, such as the clause now relied upon by CCC, should be given little weight in determining whether the parties intended specific benefits to continue beyond the term of the particular agreement. See *Intern. Union, U.A.W. v. YardMan, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983); *Weimer v. Kurz-Kasch. Inc.*, 773 F.2d 669, 675-76 (6th Cir. 1985).

7. There was no direct contemporaneous evidence of the parties' manifested intent concerning the use of surplus JSP

funds until after the Program was terminated effective October 1, 1986. No documents known to the parties specifically addressed JSP surplus funds. Although CCC contends that JSPA's Certificate of Incorporation empowered the corporation to distribute surplus funds to its members (a provision that was later added to facilitate JSPA's continued tax exempt status), it is undisputed that the ILA was unaware of that provision. Indeed, nothing in the record suggests that JSPA or CCC or its carrier members in any way made known to the ILA, the employer associations, or the Local Port Plans, that a refund to CCC's carrier members was a possibility. This Court must confine its consideration to the "objective manifestations of intent of the parties," not the parties' uncommunicated subjective intent. See *Mioni, supra.* at p. 2683; *United Auto Workers v. Cadillac Malleable Iron Co.*, 3 Employee Benefit Cases 1369, 113 LRRM 2525 (W.D. Mich. 1982), aff'd 728 F.2d 809 (6th Cir. 1984); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1225 (9th Cir. 1984).

8. In deposition, representatives of CCC testified, in substance, that CCC now deemed JSP funds to be "general corporate funds" and that CCC's only obligation was to pay shortfall payments under the terms of the JSP Agreements (apparently, as construed by CCC to include its ten criteria). The testimony is somewhat contradictory with that of ILA Vice President Raspberry who admitted that his original understanding was that JSP "surplus" funds had to be distributed to the Local Port Plans and could be used for no other purpose. Nevertheless, after the Job Security Program terminated, the ILA took the position that the union could discuss the surplus with CCC; and the ILA subsequently entered into the 1988 Settlement Agreement. CCC's post hoc self-serving testimony concerning its intended use of JSP surplus funds is not relevant. *Mioni, supra.; United Auto Workers v. Cadillac Malleable Iron Co.*, 3 Employee Benefit Cases 1369 (W.D. Mich. 1982); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1225 (9th Cir. 1984). The ILA's testimony concerning its understanding of the JSP during the time the Program was in operation fully supports the conclusion that JSP surplus funds had to be paid to the Local Port Plans. The ILA's decision to enter into "discussions" concerning the surplus and its subsequent decision to enter into a settlement agreement

simply do not bear upon the intention of the parties during the time the JSP was created and maintained.

9. In construing the terms of the collective bargaining agreements, courts often consider the "context that gave rise" to the contractual language. See *International United Automobile Aerospace and Agricultural Workers of America Union v. Yard-Man, Inc.*, 716 F. 2d 1476, 1479 (6th Cir. 1984); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 570, 80 S.Ct. 1343, 1364, 4 L.Ed.2d 1403 (1960). The context that gave rise to the JSP fully supports the conclusion that JSP surplus funds must be paid to the Local Port Plans. Thus, the JSP was born of the ILA's demand for a "master fund" to protect the Local Port Plans from the effects of automation in the maritime industry, particularly containerization. It is undisputed that the economic conditions that gave rise to the JSP in 1977 still exist, and that the Local Port Plans at many ports, including Mobile and Philadelphia, are still threatened by the trend towards mechanization and containerization. The concept of a "master fund" to protect the Local Port Plans is patently at odds with CCC's post hoc characterization of the JSP funds as "general corporate funds."

10. Underlying CCC's entire argument is the contention that CCC (the carriers) and the ILA were at liberty to negotiate the disposition of JSP surplus funds, and that they did so in the 1988 Settlement Agreement. Initially, it is doubtful that CCC and the ILA conducted "negotiations" concerning surplus JSP funds or that those negotiations resulted in a "collective bargaining agreement." CCC took the position that it was not obligated to negotiate with the ILA on the use of CCC's "general corporate funds", and that it merely undertook "discussions" on that issue in an effort to achieve an amicable settlement with the ILA. That position is certainly at odds with the "duty to bargain" imposed under the National Labor Relations Act. See 29 U.S.C § 158(a)(5), § 158(b)(3) and § 158(d). In any event, the result of those discussions was the 1988 Settlement Agreement. Under that Agreement, the ILA and CCC merely undertook to settle the Local Port Plans' pending shortfall claims. The Agreement itself makes clear and the Court so finds that only those Local

Port Plans, employer associations and local unions that agreed to become parties to the Agreement, were bound thereby.

11. Additionally, the money contributed to fund the JSP was the product of the employees' own labor, i.e., the "JSP Tonnage Assessment" based upon the amount of cargo loaded and unloaded by ILA Labor. JSPA (and CCC) acted as a conduit, channeling those funds to the Local Port Plans. Accordingly, the Court concludes that the tonnage assessment and the resulting JSP fund were a form of "compensation" for ILA Labor. Moreover, the Court's decision in Mobile III would appear to be dispositive of that issue. (*supra*. Mobile III at 23-24, 26.)

12. Since the JSP was a "negotiated benefit" for ILA Labor, and thus a form of "compensation" for work performed by ILA Labor, neither JSPA acting unilaterally nor CCC and the ILA acting in concert may deny that compensation after the labor has been performed. In this instance, the compensation was a Program established to protect the Local Port Plans covering ILA Labor. Once the employees performed the work, and earned the money contributed to the JSP for their benefit, the Local Port Plans' entitlement to that money became vested, *Upholsterers' International Union of North America v. Leathercraft Furniture Co.*, 82 F.Supp. 570, 574 (E.D. Pa. 1949); *Lewis v. Seanor Coal Company*, 256 F.Supp. 456 (W.D. Penn. 1966), aff'd 382 F.2d 437 (3d Cir. 1967), cert. denied 390 U.S. 947 (1968); *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960) (same); *Trust Fund Services v. Heyman*, 565 P.2d 805, 809 (Wash. 1977), U.S. cert denied 434 U.S. 987. Furthermore, these negotiated benefits survived the expiration of the collective bargaining agreement, and the ILA employees' entitlement to those benefits was earned or vested once the employees fully performed their obligations under the contract. See e.g., *International United Automobile, Aerospace and Agricultural Workers of America Union v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983), cert. denied 465 U.S. 1007 (1984); *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 672-73 (6th Cir. 1985); *International Union U.A.A.A.I.W. v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984); *Policy v. Powell Pressed*

Steel Co., 770 F.2d 609 (6th Cir. 1985), cert. denied 475 U.S. 1017 (1986); *Mioni, supra.*

13. By enacting ERISA, Congress did not intend to supplant or to restrict the developing federal common law under § 301 LMRA. On the contrary, ERISA supplements and expands the sources of federal common law applicable to collective bargaining agreements and the multi-employer "employee benefit plans" created and maintained under such agreements. See *International Union, UAA & AIW of America v. Keystone Consolidated Industries, Inc.*, 793 F. 2d 810, 814 (7th Cir. 1986) cert. denied 479 U.S. 932; *Indiana State Counsel of Roofers Health and Welfare Fund v. Adams Roofing Company of Kokomo, Inc.*, 753 F.2d 561, 563 (7th Cir. 1985); *Bugher v. Feightner*, 722 F.2d 1356, 1358-59 (7th Cir. 1983) cert. denied 469 U.S. 822; *Teamster's Local 348 Health and Welfare Fund v. Kohn Beverage Co.*, 749 F.2d 315 (6th Cir. 1984) cert. denied 471 U.S. 1017 (1985).

14. The JSP is not itself an "employee benefit plan" under ERISA. The Local Port Plans that the Program was created to benefit, however, were "employee benefit plans" under ERISA, and the JSP fund served as an "escrow" or "feeder" fund channeling the Carriers' employer "contributions" to those Plans. The Court therefore concludes that the express statutory mandates and the underlying policies of ERISA afford one source of federal common law applicable in this case.[4]

15. The uncontroverted facts, including CCC's own characterizations of the payments, support the conclusion that the carriers' payments to the JSP were "contributions" to the Local Port Plans. Additionally, the Court in Mobile III specifically held that JSPA's payments to the Local Port Plans were "employer

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[4] Like § 301 of LMRA, the legislative history of ERISA makes clear that the statute empowers federal courts to develop a federal common law applicable to employee benefit plans. see e.g. *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134 (1985); *Whitworth Bros. Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 794 F.2d 221 (6th Cir. 1986); *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 972-73 (5th Cir. 1981).

contributions" for the purpose of withdrawal liability under ERISA. It logically follows therefore, and the Court so finds, that the carriers' payments to the JSP (an "escrow" or "feeder" fund holding the carriers' contributions for proper distribution) were similarly "employer contributions" to the Local Port Plans.

16. Under ERISA and under § 302(c)(5) LMRA, contributions to collectively bargained "employee benefit plans" must be used for the sole and exclusive benefit of plan participants. See 29 U.S.C. § 1104, and § 186(c)(5). Additionally, under § 1103(c)(1) of ERISA, the assets of an employee benefit plan "shall never enure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants . . . and defraying reasonable expenses of administering the plan." As a matter of law, the federal labor policy embodied in § 1103(c)(1) of ERISA prohibits CCC's refund of contributions to the contributing carriers. Those funds must be used for the exclusive benefit of the employees covered by the Local Port Plans. See 29 U.S.C. § 1104 and § 302(c)(5).

17. CCC may not refund the contributions to contributing carriers or otherwise divert JSP funds from the Local Port Plans. As the Court recognized in Mobile III, "the Carrier members of JSPA voluntarily entered into the JSP Agreement and reaped the benefits of ILA Labor." (*supra*. Mobile III at 26.) They must now pay the agreed-upon compensation for the benefits they reaped.

18. The court further finds that a pro rata portion of JSP surplus funds should be paid to the Mobile Plans and Philadelphia Plans based on a fair and reasonable method of computation. See *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957); *Thompson v. Brotherhood of Sleeping Car Porters*, 367 F.2d 489, 493 (4th Cir. 1966), cert. denied 386 U.S. 960 (1967); By requiring restitution based upon JSPA's own application of its shortfall criteria, the method of distribution will benefit those ports that sustained shortfalls during the time the JSP was in operation.

19. The total shortfall payments made to the Philadelphia Plans was $20,345,209, and to the Mobile Plans $5,629,027. The total "shortfall" payments made by JSPA were $75,713,312. By dividing the former by the latter, the Philadelphia Plans received 26.8% of the total shortfall payments and the Mobile Plans receives 7.4%. Multiplying these percentages against a total surplus in the JSP fund of $57,000,000, the Philadelphia Plan is entitled to recover $15,276,000 and the Mobile Plan $4,218,000, for which amounts the Court will enter summary judgment in favor of the Philadelphia and Mobile Plans, respectively.

20. The Court further concludes that plaintiffs are entitled to recover the attorneys' fees and costs incurred in prosecuting this action. The Supreme Court has approved application of the "common fund doctrine" in awarding attorneys' fees in a case such as this. Under the common fund doctrine, an award of attorneys' fees to a prevailing party is appropriate when that party's efforts result in a fund to benefit others:

> [T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 24 L.Ed.2d 593, 90 S.Ct. 616 (1970); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 83 L.Ed. 1184, 59 S.Ct. 777 (1939); . . . The common-fund doctrine reflects the traditional practice in courts of equity, . . . and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees. . . Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

Boeing Co. v. Van Gemert, 444 U.S. 472, 478, 62 L.Ed.2d 676, 681-82, 100 S.Ct. 745 (1980). See also *Overseas Development Disc Corp. v. Sangamo Construction Co.*, 840 F.2d 1319 (7th Cir. 1988). In this case, plaintiffs instituted the action solely for

the benefit of the Local Port Plans. It is undisputed that the entire recovery will go to those Plans. At no time, have plaintiffs sought to recover money on their own behalf. Under these circumstances, plaintiffs are entitled to an award of attorneys' fees from CCC to be paid from the common fund awarded to the plaintiffs according to this order and separate judgment.

CONCLUSION

Based upon the foregoing Determination of Uncontroverted Facts and Conclusions of Law, the court concludes that there is no genuine issue as to any material fact on the claims raised in Plaintiffs' Motion for Partial Summary Judgment, and that plaintiffs are entitled to a judgment as a matter of law. It is therefore ORDERED:

(1) Plaintiff's Motion for Partial Summary Judgment is GRANTED, and Defendant's Motion for Summary Judgment is DENIED.

(2) The Mobile Plans are entitled to a judgment against Carriers Container Corporation in the amount of $4,218,000, together with interest and costs of this action.

(3) The Philadelphia Plans are entitled to a judgment against Carriers Container Corporation in the amount of $15,276,000, together with interest and the costs of this action.

(4) Plaintiffs are entitled to an award of attorneys' fees from the common fund recovered by the plaintiffs, and shall submit evidence within twenty-one (21) days from the date of this Order to establish the amount of the attorneys' fees incurred by each party in prosecuting this action.

(5) The "Determinations of Uncontroverted Fact" shall be deemed established for the purpose of further proceedings in this action.

(6) Pending payment of the amounts specified in this Order, Carriers Container Corporation, its officers, agents, servants,

employees and attorneys, and any persons in active concert or participation with them, are enjoined from paying or distributing any funds collected under the Job Security Program, including any interest earned thereon, to any person or entity, including but not limited to (a) utilizing such funds for any operating expenses of Carriers Container Corporation that are unrelated to the administration of the Job Security Program, (b) refunding any such funds to the members of Carriers Container Corporation, or otherwise allowing such members to use the funds to pay the members' financial obligations, (c) implementing Carriers Container Corporation Credit Memo Procedures, or any other procedures designed to distribute such funds.

(7) The Court expressly determines that there is no just reason for delay in the entry of final judgment in favor of the plaintiffs and against defendant on the claims adjudicated herein and expressly directs the entry of final judgment thereon.

DONE this the 22nd day of June, 1989.

/s/ Charles B. Butler
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CARRIERS CONTAINER
COUNCIL, INC.,

Plaintiff,

vs.

CIVIL ACTION
NO. 88-0095-BH-C

MOBILE STEAMSHIP
ASSOCIATION, INC., et al.,

Defendants.

JUDGMENT

Pursuant to the Findings of Fact, Conclusions of Law and Order entered this day, it is ORDERED, ADJUDGED and DECREED that plaintiff's complaint be and is hereby DISMISSED. No costs are to be taxed.

DONE this 21st day of March, 1989.

/s/ W.B. Hand
SENIOR DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
21st DAY OF MARCH,
1989, JUDGEMENT ENTRY _____
NO. 6064
JOHN V. O'BRIEN, CLERK
BY: /s/
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CARRIERS CONTAINER
COUNCIL, INC.,

Plaintiff,

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NO. 88-0095-BH-C

MOBILE STEAMSHIP
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Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This cause is before the Court on the parties' cross-motions for summary judgment. Plaintiff, in its complaint, essentially seeks a declaration that it is not an employer for purposes of the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. § 1381, *et. seq.* and therefore not subject to pension withdrawal liability. Defendants have counterclaimed for the amount of plaintiff's alleged withdrawal liability.

For the reasons set forth in the body of this decision, the Court concludes that there exists no genuine issue of material fact and that defendant's motion for summary judgment is due to be granted while plaintiff's motion for summary judgment is due to be denied.

I. Findings of Fact

After careful consideration of the parties' respective motions for summary judgment and responses in opposition thereto and based upon the pleadings, exhibits and other evidence of record, the Court makes the following Findings of Fact:

1. Plaintiff Carriers Container Council, Inc. (CCC) is a Delaware non-stock, not-for-profit membership corporation whose members are vessel carriers engaged in maritime transport on the Atlantic and Gulf Coasts of the United States. JSP Agency, Inc. (JSPA) was formed in 1977 as an incorporated association of vessel carriers which were parties to the Job Security Program (JSP) Agreement. From its formation in 1977 until June 4, 1987, JSPA's stated purpose was to implement and carry out provisions of the JSP Agreements entered into by and between the International Longshoremen's Association and its local affiliates and certain deep sea carriers. On June 4, 1987, JSPA's certificate of incorporation was amended to include the functions of Carrier Container Council which theretofore existed as an unincorporated association of vessel carriers, and to change the name of the corporation to Carriers Container Council, Inc. (collectively referred to herein as "JSPA/CCC").

2. Defendant Mobile Steamship Association, Inc.-International Longshoremen's Association, AFL-CIO Pension Plan and Trust (hereinafter "Plan") is a joint labor-management trust which administers a multiemployer employee benefit pension plan, within the meaning of 29 U.S.C. §§ 1002(2),(3) and (37) and 1301(a)(3). The Plan provides pension benefits to certain eligible longshore workers in the Port of Mobile. Defendants F. D. Alspaugh, Arthur Stratton, Hartell Ludlow and Ned Mattingly are the Plan's employer trustees. Defendants Henry L. Clarke, Albert Walton, Jr., Felix Cleveland and Seymour Irby are the union trustees of the Plan. Anthony Costell has recently replaced Felix Cleveland as a trustee.

3. The International Longshoremen's Association, AFL-CIO (ILA) is a labor organization of waterfront employees engaged in longshoring and related operations in ports on the Atlantic and Gulf coasts of the United States, including the Port of Mobile, Alabama. ILA is the collective bargaining representative for these employees in connection with certain master terms and conditions of employment that apply uniformly in all ports. (Plaintiff's Exhibit 4 and 5).

4. The Mobile Locals are ILA Local 1410, ILA Local 1410-1, ILA Local 1459 and ILA Local 1985. Local terms and conditions applicable to the Port of Mobile are negotiated by the ILA locals in that port. (Irby Deposition at 393[1]; MacPherson Deposition at 403-404).

5. Mobile Steamship Association, Inc. (MSSA), an Alabama not-for-profit membership corporation, is a multiemployer bargaining association representing employers of longshore workers in the Port of Mobile. Although MSSA's membership includes carrier agents, it consists primarily of stevedoring companies. (Irby Deposition at 392). All of the MSSA directors are stevedoring company executives and virtually all of the members of the MSSA Negotiating Committee are representatives of stevedoring companies. (MacPherson Deposition at 409-411). MSSA negotiates and enters into collective bargaining agreements with the Mobile Locals.

6. Pension benefits for eligible longshore employees represented by Locals 1410, 1410-1 and 1459 are provided by the Plan.[2] The Mobile Locals appoint the union trustees of the Plan and MSSA appoints the employer trustees of the Plan.

7. It is undisputed that longshore collective bargaining traditionally has involved a two-tier structure. First, the ILA negotiated a master contract with a combined management group which was composed of employer associations in ports from Maine to Texas, including since 1980 MSSA. *See e.g.*, Plaintiff's Exhibit 4. This contract fixed the master terms of employment which applied uniformly in every ILA port: wages, hours,

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[1] Unless specifically designated otherwise, the citations to plaintiff's exhibits and deposition testimony refer to pages designated by the plaintiff in its bound volume of exhibits, which was filed in support of its motion for summary judgment.

[2] Longshore workers represented by ILA Local 1985 receive pension benefits from the Local 1985 Maintenance Employees Pension Plan (Local 1985 Plan), which is separate and distinct from the defendant Plan.

term of contract, pension contributions, welfare contributions, containerization and LASH. When agreement was reached on these master terms, local terms and conditions were negotiated in the individual ports, including Mobile.

8. As stated above, MSSA negotiates and enters into collective bargaining agreements with the Mobile Locals. These local collective bargaining agreements address local terms and conditions including seniority, hiring practices, safety, vacations, holidays and other matters of local concern. *See e.g.*, Plaintiff's Exhibit 16; MacPherson Deposition at 404-06. These agreements also prescribe a contribution rate per hour to be paid specifically to the pension, welfare and vacation plans for the Mobile Locals.[3]

9. Vessels calling at the Port of Mobile are operated by steamship carriers engaged in the transport of goods by sea in foreign and interstate commerce. These carriers retain stevedoring companies to load and unload the carriers' ships. Stevedoring companies bound by ILA contracts employ ILA workers for this purpose. These longshore workers are members of the Mobile locals.

10. In 1977, longshore master negotiations broke down over the issue of job security. The employer associations were unable to deal with the ILA's demand for some form of protection for longshore employee benefit funds from the effects of declining contribution levels caused by the decision of vessel carriers to bypass ports at which their vessels had historically called. Containerization, or the transport of cargo in large, reusable metal receptacles, enabled carriers to concentrate their vessel calls at one or two load center ports from which the containers could

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[3] Article Ten of the Plan Agreement provides: "Effective as of October 1, 1981 each Waterfront Employer shall pay into the Trust Fund, at intervals to be decided upon by the Trustees, the sum of (i) One Dollar and Ninety-Seven Cents ($1.97) per hour for each hour worked by each of its Employees employed in Covered Employment, and (ii) such additional amounts, if any, as may be determined in collective bargaining". (Plaintiff's Exhibit 20 at 228). The Plan Agreement empowers the trustees "to demand, collect and receive Employer contributions from Employers". (Plaintiff's Exhibit 20 at 233).

be trucked to other port areas. The elimination of vessel calls at these other ports by some carriers diminished the man-hours or work performed by longshore employees as well as the contributions to their pension and other fringe benefit funds. In Mobile and most other Atlantic and Gulf ports, pension contributions were and still are payable on the basis of ILA manhours worked.

11. The impasse on this critical issue of job security precipitated the 1977 selective strike against container carriers in all ports from Maine to Texas, which was resolved when vessel carriers directly negotiated the first JSP Agreement of November 13, 1977 (hereinafter "1977 JSP Agreement") with the ILA, its Atlantic Coast District (ACD) and its South Atlantic and Gulf District (SAGD), which covered the three year term from October 1, 1977 through September 30, 1980.

12. The 1977 JSP Agreement provided that the subscribing carriers would undertake to protect local pension and certain other longshore employee benefit funds (welfare and Guaranteed Annual Income or "GAI") in ports from Maine to Texas, including the Port of Mobile, from shortfalls or deficits in contributions occurring during the term of the agreement which result from a loss of manhours and are not caused by strikes. The funding for the Job Security Program was undertaken by the carriers in accordance with the tonnage assessment method set forth in Appendix B to the JSP Agreement.[4]

13. The monies needed to meet the obligations arising under the JSP Agreement were obtained by an assessment imposed on carriers based upon their cargo tonnages loaded or discharged by ILA labor in the covered ports. The JSP Tonnage Assessment provided that (1) "the Carriers shall estimate the total obligations for shortfall incurred to date from all sources including information supplied by the local Port Associations and shall either increase, decrease, adjust or suspend such assessment,

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[4] The JSP Agreement expressly stated that "the liability for shortfall provided for in this JSP agreement is to be undertaken by the Carriers in accordance With the assessment method set forth in Appendix B". (Plaintiff's Exhibit 1 at 2).

depending upon experience;" (2) "[s]uch tonnage assessment amounts shall be collected as necessary from the Carriers by the administrative agency (to be known as the JSP Agency) created by the Carriers which shall pay out the shortfall payments required by this Agreement;" and (3) "[t]he JSP Agency shall hold such amounts in interest-bearing accounts or in appropriate investment accounts and shall pay out such amounts only for obligations under the JSP Program and the expenses of administration thereof." (Plaintiff's Exhibit 1 at 13).

14. The 1977 JSP Agreement required that the local port plans be funded in a manner which resulted in:

> [A] fair and equitable assessment in each local port either on an hourly or an a tonnage basis, or on both, as determined by each local port association, which assessments shall be based upon statistically sound principles intended to create sufficient revenue over the life of the collective bargaining agreements to support such plans in each local port.

(Plaintiff's Exhibit 1 at 3). The 1977 JSP Agreement further required:

> Such assessments shall be reviewed annually by each local port association for the purpose of adjusting contributions in GAI, Pension and Welfare provided by the collective bargaining agreement and so as to continue to provide for actuarily [sic] and/or statistically sound plans. A shortfall in manhours or tonnage which is anticipated to continue shall not be included in such adjusted contributions.

(Plaintiff's Exhibit 1 at 3-4).

15. Shortly after the execution of the 1977 JSP Agreement, plaintiff, then known as JSPA, was formed as the carrier organization contemplated in the agreement to administer the JSP Tonnage Assessment and to pay out the shortfall payments

required by the agreement. In 1985, the membership of JSPA, which was composed of vessel carriers that had signed the JSP Agreement, amended JSPA's bylaws to authorize JSPA to negotiate on behalf of its members on JSP matters.

16. On May 28, 1981, the United States Department of Labor issued a letter ruling that JSPA was not an employee benefit plan under the Employee Retirement Income Security Act (ERISA). JSPA had also received tax-exempt status as a business league under 26 U.S.C. § 501(c)(6), which tax-exempt status CCC continues to date.

17. On May 27, 1980, a successor JSP Agreement for the period from October 1, 1980 through September 30, 1983 (1980 JSP Agreement) was reached between the carriers and the ILA. (Plaintiff's Exhibit 3). The 1980 JSP Agreement continued in effect the terms of the predecessor 1977 JSP Agreement virtually unchanged except for some revisions which are not pertinent to this case. *Compare*, Plaintiff's Exhibit 1 with Plaintiff's Exhibit 3.

18. Although the longshore master contract for the period from October 1, 1983 through September 30, 1986, which was negotiated with the ILA by employer associations from Maine to Texas, including MSSA, contained a provision that "the JSP Program shall be updated and extended by the Carriers" (Plaintiff's Exhibit 5 at 65), no new JSP Agreement covering that period was ever signed (Schmidt Deposition at 431).

19. On September 5, 1986, the ILA executed a master contract with several employer associations, including JSPA, which provided as follows:

> The Job Security Program shall be discontinued as of October 1, 1986, except for the purpose of meeting any obligations of the Fund under the existing agreement. Any surplus, after all such obligations have been satisfied, shall be discussed with the ILA.

20. The plan was established in 1957 by an agreement and declaration of trust entered into between MSSA and certain

Mobile Locals in accordance with the terms of their local collective bargaining agreement, dated October 1, 1956. A few independents not represented by MSSA were also parties to the Plan.

21. The Plan provides retirement benefits to employees of "Waterfront Employers" for "covered employment", which is defined in the Plan's Pension Plan and Trust Agreement, amended and restated as of October 1, 1984, (hereinafter "Pension Agreement") as longshore employment in the Port of Mobile under a Collective Bargaining Agreement between an Employer and the Mobile Locals (other than ILA Local 1985). The Plan also provides retirement benefits to employees of certain MSSA-ILA employee benefit plans and employees of certain Mobile Locals.

22. The plan is a defined benefit plan. (Plaintiff's Exhibit 22 at 293. The Plan Agreement prescribes the level or amount of normal, early and disability retirement benefits to which eligible employees are entitled. (Plaintiff's Exhibit 20 at 213). The Plan Agreement also authorizes the trustees of the Plan to adjust the level of benefits whenever the financial situation of the Plan permits. (Plaintiff's Exhibit 20 at 214).

23. In 1984, the Plan, the Local 1985 Plan and another longshore benefit plan in Mobile commenced an action against JSPA to recover shortfall payments under the 1980 JSP Agreement, styled *F.D. Alspaugh, et al. v. JSP Agency. Inc.*, Civil Action No. 84-1328-C (S.D. Ala. filed Nov. 26, 1984). The Complaint was subsequently amended to include a shortfall claim under the 1977 JSP Agreement.

24. During this time, JSPA made loans to all the Mobile longshore employee benefit plans involved in that lawsuit. By wire transfer on November 5, 1985, JSPA loaned $456,996 to the Plan. This payment was reflected in the Plan's books of account and financial statement as "Loan Payable - JSP Agency, Inc."

25. *Alspaugh* was settled by the June 20, 1986 Settlement Agreement which resolved shortfall claims under the JSP

Agreements from October 1, 1977 through September 30, 1986 through a combination of loan cancellations and cash payments. Finally, the settlement included a payment for the 1983-86 period, even though that contract period was not a part of the lawsuit. By order, dated June 26, 1986, this court approved, confirmed and ratified the settlement agreement in *Alspaugh*.

26. On July 3, 1986, the Plan received the following:

(a) a check in the amount of $42,314 from the clerk of this Court, pursuant to paragraph 1 of the *Alspaugh* settlement agreement;

(b) a wire transfer in the amount of $602,960 from JSPA pursuant to paragraph 3 of the *Alspaugh* settlement agreement; and

(c) an acknowledgement from JSPA cancelling the outstanding loan of $456,996 pursuant to paragraph 2 of the *Alspaugh* settlement agreement.

27. In December, 1986, the final man-hours for the contract year ending September 30, 1986 were tabulated, and the final installment to be paid by JSPA to the plaintiff plans pursuant to paragraphs 3, 4 and 5 of the *Alspaugh* settlement agreement were calculated. When the dispute concerning the wording of the general release required by paragraph 7 of the *Alspaugh* settlement agreement was resolved, the Plan received the final settlement agreement installment of $173,950.25 plus interest on May 17, 1988.

28. The Plan's method for calculating withdrawal liability is set forth in Article Ten, Section 10.05 of the Plan Agreement. By letter dated December 21, 1987, the Plan notified CCC/JSPA that the Plan's trustees had determined that CCC/JSPA had completely withdrawn from the plan during the plan year ending September 30, 1987 and thereby incurred a withdrawal liability of $1,236,836. In the same letter, the Plan demanded that CCC/JSPA pay the withdrawal liability in accordance with an installment schedule consisting of 12 quarterly payments of $109,331.36 and a final installment of $56,828.93. (Plaintiff's Exhibit 26). Under the schedule, the first payment was due on

February 20, 1988 and the succeeding payments were payable on the 20th day of May, August, November and February, with the final installment due on May 20, 1991. *Id.*

29. By letter dated January 12, 1988, CCC/JSPA requested the plan to review and reconsider the Plan's determination that CCC/JSPA was responsible for withdrawal liability to the Plan. CCC/JSPA has not paid any of the withdrawal liability installments demanded by the Plan.

30. On February 3, 1988, CCC/JSPA commenced this action for a declaratory judgment that CCC/JSPA is not an employer liable for withdrawal liability to the Plan, and other relief. It is CCC/JSPA's position that the Plan's claim for withdrawal liability is without legal or factual foundation because CCC/JSPA is not an employer, never engaged in covered operations under the Plan, never subscribed to collective bargaining agreements between MSSA and the Mobile Locals and never contributed to the Plan.

31. On February 29, 1988, the Plan answered and counterclaimed for an order directing CCC/JSPA to pay the entire amount of withdrawal liability plus interest. The defendants specifically request that this Court: (i) order the parties to submit to arbitration to determine CCC's withdrawal liability; (ii) stay this proceeding in regard to the determination of CCC's withdrawal liability pending arbitration and the possible review of the arbitrator's decision; (iii) order plaintiff to pay costs and attorneys' fees incurred by defendants in this action; and (iv) order plaintiff to pay interim payments of withdrawal liability pursuant to 29 U.S.C. § 1399(c)(2) and the authority granted by 29 U.S.C. § 1451(b) and (c), including the immediate payment of all past due installments.

32. On May 2, 1988, plaintiff requested that defendants agree to voluntarily hold in abeyance statutory arbitration pending this Court's decision regarding plaintiff's employer status. On June 22, 1988, plaintiff wrote to the American Arbitration Association, by letter from Peter C. Lambos, seeking to initiate statutory MPPAA arbitration. On June 23, 1988, defendants

wrote plaintiff alleging that the plaintiff was in default on its payment for withdrawal liability. On June 28, 1988, counsel for defendants advised the American Arbitration Association that defendants had not consented to the utilization of the American Arbitration Association Rules. On June 28, 1988 as well, plaintiff filed a motion to stay arbitration and to toll the time periods for arbitration under the MPPAA. On July 18, 1988, the Court granted plaintiff's motion and stayed arbitration pursuant to the MPPAA pending this Court's determination of whether plaintiff was ever an employer subject to the MPPAA.

II. Conclusions of Law

This Court has subject matter jurisdiction to entertain this action under 29 U.S.C. §§ 1132(d)(1), 1451(a) and 1451(c) and 28 U.S.C. §§ 1331, 1332(a) and 1337. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and 29 U.S.C. §§ 1132(e)(2) and 1451(d). As stated previously by this Court in its order of July 18, 1988, the central issue in this case is one of whether the plaintiff was ever an employer subject to the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. § 1401, *et seq.*, and not one of whether the plaintiff at some time ceased to be an employer subject to MPPAA. Consequently, the central issue is one properly before this Court, and not one for an arbitrator under MPPAA, "since its resolution determines the arbitrator's authority over the dispute". *Banner Industries, Inc. v. Central States Southeast and Southwest Areas Pension Plan*, 657 F. Supp 875, 882 (N.D. Ill. 1987). *See also, Flying Tiger Line, Inc. v. Teamsters Pension Trust Fund of Philadelphia*, 830 F.2d 1241, 1250-51 (3d Cir. 1987).

Congress regarded employer withdrawals to be a significant potential threat to the well-being of multiemployer pension plans and the employers left behind. Congress specifically found that "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations". 29 U.S.C. § 1001a(a)(4)(A). *See also, Connolly v. Pension Benefit Guaranty*

Corp., 475 U.S. 211, 215-16, 106 S.Ct. 1018, 1021, 89 L.Ed.2d 166, 173 (1986), *quoting, Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 722 at n.2, 104 S.Ct. 2709, 2714 (1984). A principal objective of MPPAA was to remove the incentive for a contributing employer to withdraw by imposing liability at the time of withdrawal. *Connolly, supra*, 475 U.S. at 217.

MPPAA imposes this withdrawal liability on "an employer [who] withdraws from a multiemployer plan". 29 U.S.C. § 1381(a). Withdrawal is defined as the cessation of the obligation to contribute under the plan or the cessation of covered operations under the plan. 29 U.S.C. 1383(a). The obligation to contribute is one arising under a collective bargaining agreement or as a result of a labor law duty but does not include an obligation to pay withdrawal liability or to pay delinquent contributions. 29 U.S.C. § 1392(a). The amount of withdrawal liability is equal to the withdrawing employer's share of the plan's total unfunded vested benefits. 29 U.S.C. § 1391. Generally, this share is computed as the ratio of the withdrawing employer's contributions to the total plan contributions. 29 U.S.C. § 1391(c)(3).

The threshold question in this case is whether CCC/JSPA is an employer under MPPAA. Absent employer status, CCC/JSPA would not be subject to the MPPAA and could not incur withdrawal liability. Although the term "employer" appears throughout the statute, MPPAA does not contain a definition of that term. For the reasons set forth below, this Court concludes that CCC/JSPA is an employer subject to the MPPAA.

At the outset, this Court must agree with the defendants that the "common law" definition of employer is inapplicable to the MPPAA. *See e.g., Delta Steamship Lines, Inc. v. New York Shipping Association*, 688 F.Supp 1560 (S.D.N.Y. 1988); *Korea Shipping Corp. v. New York Shipping Association*, 663 F. Supp 766 (S.D.N.Y. 1987). *Cf., Refined Sugars Inc. v. Local 807 Labor-Management Pension Fund*, 632 F. Supp 630 (S.D.N.Y. 1986) (rejected the use of common law criteria as a means of determining whether an entity was an "employer" for purposes of

assessing withdrawal liability but found that, even if applicable, the entity was not an employer under the common law criteria).

Although the decisions of the New York District Court are not binding precedent in this Circuit, this Court is persuaded by the analysis employed in the above-referenced decisions. This Court first agrees that, because the MPPAA contains no explicit definition, "the term 'employer' must be defined in the context of the statute and 'must be read in the light of the mischief to be corrected and the end to be attained.'" *Delta Steamship, supra*, 688 F. Supp at 1563, *quoting*, *NLRB v. Hearst Publications*, 322 U.S. 111, 124, 64 S.Ct. 851, 857, 88 L.Ed. 1170 (1944). Consequently, as Judge Leisure so aptly opined:

> Were Congress to be deemed to have adopted a common law definition of "employer," then application of the MPPAA's withdrawal liability would be restricted to those pension plan contributors who control and supervise the work of the plan's beneficiaries, pay the wages of the beneficiaries, and have the right to hire and fire the beneficiaries. Nothing in the MPPAA or its legislative history indicates that Congress sought to impose such a restriction. While common law "employers" normally will make the necessary contributions to a multiemployer pension plan, it is contributions to the plan, rather than the terms of the employment relationship *per se*, which the MPPAA regulates. It would frustrate the congressional purpose behind the MPPAA to hold that contributors, which are not common law employers, can never be subject to withdrawal liability.

688 F.Supp at 1563. Judge Leisure relied in part on Judge Weinfeld's earlier explanation of the problem:

> The risk Congress sought to address through the MPPAA was to preserve the fiscal soundness of a multiemployer plan from being impaired by the withdrawal of a contributor to that plan before the contributor had satisfied its portion of the plan's

> unfunded vested benefits. Clearly, through the imposition of liability in the event of withdrawal, Congress sought to remove the incentive for a contributor to withdraw prematurely from a plan, and, where such withdrawals also took place, to mitigate the financial impact on the plan through the actual payment of withdrawal liability. To give the term "employer" a common law or dictionary definition ... would eliminate withdrawal liability for a large number of "contributors" and expose many multiemployer plans to the precise threat that Congress meant to address through the enactment of the MPPAA.

688 F.Supp at 1563, *quoting*, *Korea Shipping*, *supra*, 663 F.Supp at 769. Ultimately, the New York Courts concluded that "the term 'employer', as used in 29 U.S.C. § 1381(a), is meant to include a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants". 688 F.Supp at 1565, *quoting*, *Korea Shipping*, 663 F. Supp at 770. This definition specifically embraces the definition of "employer" set forth in Title I of ERISA at § 3(5), 29 U.S.C. § 1002(5).[5] In support of the decision to apply the Title I definition to the MPPAA, the New York Courts cite with approval the analysis of the Florida District Court in *In re Uiterwyk Corp.*, 63 Bankr. R. 264 (Bankr. M.D. Fla. 1986).[6] *Korea*

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[5] The term "employer" is defined in ERISA to mean "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity". 29 U.S.C. § 1002 (5).

[6] Certain courts have held that the ERISA definition of "employer" is expressly inapplicable to the MPPAA. *See eg.*, *Refined Sugars, Inc. v. Local 807 Labor-Management Pension Fund*, 632 F.Supp 630, 631-33 (S.D.N.Y. 1986); *In re Seatrain Lines, Inc.*, 46 Bankr. R. 320 322 (Bankr. S.D.N.Y. 1985). These Courts relied principally upon the Supreme Court's statement in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 370 n. 14, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980), that "Title I definitions do not apply elsewhere in the Act of their own force". The Court in *In re Uiterwyk Corp.*, 63 Bankr. R. 264 (M.D. Fla. 1986), recognized, however, that the Supreme Court qualified this statement by adding that the Title I definitions "may otherwise reflect the meaning of the terms defined as used in other Titles". 63 Bankr. R. at 266, *quoting*, *Nachman*, 446 U.S. at 370 n. 14.

Shipping, 663 F. Supp at 770, n. 23. This Court concurs in the reasoning of the New York District Courts as set forth above.

In view of the above, the Court must now determine whether CCC/JSPA is a contributing obligor, specifically an entity obligated to pay contributions to the Plan, and therefore an employer within the meaning of the MPPAA. *Delta Steamship*, 688 F.Supp at 1564-66; *Korea Shipping*, 663 F.Supp at 770-72. Despite plaintiff's contentions to the contrary, the Court concludes that CCC itself is a contributing obligor to the Plan under a collective bargaining agreement and, therefore, subject to withdrawal liability under the MPPAA.

Plaintiff first contends that the only payment it made to the Plan was of monies in settlement of litigation, a payment which did not arise under a collective bargaining agreement. In the alternative, plaintiff contends that, should its payment under the settlement agreement be construed as deriving from the terms of a collective bargaining agreement, the only collective bargaining agreement which defines the obligation to contribute to the Plan in this case is the longshore labor agreements with the Mobile Locals, not the JSP Agreement. In other words, plaintiff contends that the shortfall payments required by the JSP Agreement do not constitute contributions to the Plan because such payments "are not a form of compensation in exchange for labor performed computed at a fixed rate based upon some unit of work output (man-hour, ton, percentage of pay, etc.) and used to fund fringe benefits for those rendering the services". Plaintiff's Brief at p. 17.

It is abundantly clear, as even the plaintiff recognizes, that the settlement agreement in *Alspaugh* resolved a dispute over CCC/JSPA's, and its member carriers', obligations to make shortfall payments to the Plan under the JSP Agreement. Thus, the contention that CCC/JSPA's obligation to the Plan arose from the terms of a settlement agreement and not from a labor contract is fallacious.

Plaintiff's alternative contention, essentially that any obligation to contribute to the Plan must be defined solely with reference to the local collective bargaining agreements and not

the JSP Agreement, is similarly sophistic. The mere fact that the local collective bargaining agreements contain a provision concerning contributions to the defendants' Plan does not serve as a basis for ignoring certain provisions of interrelated collective bargaining agreements. The MPPAA specifically provides that "the term 'obligation to contribute' means an obligation to contribute arising. . . under one or more collective bargaining (or related) agreements". 29 U.S.C. § 1392 (a)(1).

As the plaintiff itself acknowledges, longshore collective bargaining traditionally has involved a two-tier structure, namely the initial negotiation of a master contract by and between the ILA and a combined management group composed of employer associations in ports from Maine to Texas which fixes the master terms of employment to be applied in every ILA port and then the negotiation of local collective bargaining agreements by and between, in this case, the MSSA and the Mobile Locals which fixes local terms and conditions of employment. Both the master contract and the local collective bargaining agreement contain provisions concerning the obligation to contribute to a multiemployer plan. It is also undisputed that the JSP Agreement, negotiated between the carrier members of CCC/JSPA and the ILA on behalf of its affiliated local unions in each port from Maine to Texas, was instrumental in resolving the 1977 impasse in longshore master negotiations and the selective strikes against container carriers in all ports from Maine to Texas. It simply cannot be contended that the JSP Agreement, which was specifically referred to in the Master Contracts, was neither itself the product of collective bargaining nor related to the collective bargaining agreement between MSSA and the Mobile Locals.

In connection with the above, plaintiff contends that the obligation for shortfall payments under the JSP Agreement is not an obligation to contribute within the meaning of ERISA or the MPPAA. Specifically, plaintiff contends that in order to be considered a "contribution", any compensation to a plan must be based upon some actual unit of work output because only then can it be said to be compensation in exchange for labor performed. Plaintiff argues that, unless the compensation is

directly related to a specific unit of work output, the compensation merely equates with such monetary gains as interest or dividend income earned on plan investments and that it certainly would not be appropriate to transform banks, insurance companies or others into contributing employers based upon such interest or dividend payments to a plan. While at first blush the Court was admittedly intrigued by plaintiff's analogy, the glow quickly waned. CCC/JSPA and its carrier members simply do not stand on equal footing with those entities providing only investment services to a plan. CCC/JSPA and its carrier members did receive the services of longshoremen in the Port of Mobile and other ports in the loading and unloading of their ships. The 1977 JSP Agreement was in fact entered into in order to obtain for the carrier members of CCC/JSPA the services of ILA labor and to end a very costly strike against containerized carriers.[7]

It is perhaps appropriate at this juncture to note that intertwined throughout plaintiff's divers contentions is the assertion that neither it nor its carrier members directly employed the longshoremen and that only the stevedoring companies who were the direct employers of the longshoremen could be considered contributing obligers under the MPPAA. However, as Judge Weinfeld pointed out in *Korea Shipping, supra*, such a contention "ignores the reality of the situation". 633 F.Supp at 772. The factual basis of this case is similar to that of the *Korea Shipping* case, as well as the later *Delta Steamship* case, in which the issue was approached from a different perspective. In the New York cases, it was a signatory carrier who attempted to avoid withdrawal liability by contending that the entity who physically paid the contributions to the pension funds, an entity

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[7] Despite plaintiff's protestations to the contrary, neither *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960), nor 29 U.S.C. §§ 1082 and 1083, mandate that contributions to a plan must be computed at a fixed rate which is expressly based on some measurable unit of work output such as wages and man-hours. There clearly exists no statutory prohibition against the imposition of an obligation to contribute to a plan at a fixed rate which is based on shortfalls or deficits in contributions caused by the decision of carriers to bypass certain ports.

composed of steamship carriers and other employers of longshoremen labor, was the contributing obligor subject to withdrawal liability under the MPPAA. The New York Courts rejected the carrier's contentions and held that the carrier was an MPPAA "employer" because "unquestionably it was, at the very least, acting indirectly in the interests of an employer [the stevedoring companies] in relation to the pension plan". *Delta Steamship*, 688 F.Supp at 1565, *quoting*, *Korea Shipping*, 663 F.Supp at 772. Judge Weinfeld nonetheless recognized that, in addition to the member carrier individually, the entity itself also fell within the definition of "employer" and was likewise subject to withdrawal liability under the MPPAA. *Korea Shipping*, 663 F.Supp at 772, n. 27.

As in the New York cases, the parties to the JSP Agreement, including the carrier members of CCC/JSPA, appear in this case to have assumed that there was at least an indirect employment relationship between the carriers and the longshoremen. Certainly the carrier members of CCC/JSPA could not have had their vessels loaded or unloaded in the Port of Mobile or elsewhere from Maine to Texas without compliance with the JSP Agreement. Consequently, CCC/JSPA and its carrier members were, at the very least, acting indirectly in the interests of an employer in relation to the defendants' plan.

Finally, plaintiff contends that neither CCC/JSPA nor its carrier members acted directly as employers or indirectly in the interest of an employer because the JSP Agreement constituted no more than a "guarantee of a certain level of contributions to the Plan" and, at best, the carriers were mere "guarantors of contributions to the Plan".[8] Plaintiff's Brief at p. 21. Unlike

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[8] In its complaint, plaintiff additionally alleges that defendants are barred from asserting any further claims against the plaintiff because of the settlement agreement reached in *Alspaugh v. JSP Agency Inc.*, Civil Action No. 84-1328-C (S.D. Ala. Dec. 3, 1984). It is understandable that plaintiff chose not to argue this claim in its motion for summary judgment. Judge Cox made abundantly clear in his memorandum opinion of May 6, 1988, that the *Alspaugh* settlement agreement addressed only "shortfalls" in contributions from October 1, 1977 to September 30, 1986. The settlement agreement does not, therefore, present a bar relative to defendants' claim for withdrawal liability in this case.

the cases relied upon by the plaintiff[9], however, the carrier members of CCC/JSPA were signatories to the collective bargaining agreement, specifically the JSP Agreement, which mandated contributions to the defendants' Plan. Although this Court agrees that the MPPAA was never intended to enable pension plans to impose liability on unsuspecting strangers, CCC/JSPA and its carrier members can hardly be classified as unsuspecting strangers. The carrier members of CCC/JSPA voluntarily entered into the JSP Agreement and reaped the benefits of ILA labor. In addition, contrary to plaintiff's assertions, the imposition of withdrawal liability on the plaintiff will not relieve the stevedoring companies of their share of the Plan's unfunded liabilities.

In addition to a declaration that plaintiff is an "employer" and subject to withdrawal liability under the MPPAA, defendants seek to have this Court: (i) stay this proceeding "pending arbitration and the possible review of the arbitrator's decision;" (ii) order plaintiff to pay the costs and attorneys' fees incurred by defendants in this action; and (iii) order plaintiff to pay interim payments of withdrawal liability pursuant to 29 U.S.C. § 1399(c)(2), including the immediate payment of all past due installments as, presumably, demanded in the Plan's letter to CCC dated December 21, 1987. Upon consideration of these specific requests for relief, the Court first questions the appropriateness of staying this proceeding in lieu of dismissal pending arbitration. The MPPAA expressly provides:

> Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto *may bring an action*, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 4301 [29 USCS § 1451] to enforce, vacate, or modify the arbitrator's award.

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[9] Plaintiff relies, *inter alia*, upon: *Giardiello v. Balboa Insurance Co.*, 837 F.2d 1566, 1569-70 (11th Cir. 1988); *Laborers Local 938 Joint Health & Welfare Trust Fund v. B.R. Starnes Co.*, 827 F.2d 1454, 1456-57 (11th Cir. 1987); and *Xaros v. U.S. Fidelity and Guaranty Co.*, 820 F.2d 1176, 1178-80 (11th Cir. 1987).

29 U.S.C. § 1401(b)(2) (emphasis added). Inasmuch as it is possible that no party may choose to challenge the arbitrator's decision and since there clearly exists a mechanism by which the defendants can challenge the arbitrator's decision by bringing a separate action, it would appear inappropriate to merely stay this action pending arbitration. The Court therefore concludes that defendant's request to stay this proceeding is due to be denied and, in lieu thereof, that plaintiff's complaint is due to be dismissed.

As to defendants' request for an award of costs, including attorneys' fees, the Court is not prepared at this juncture to grant the request. Since this action presented an issue not previously addressed by any court in this circuit, nor many courts in general, the Court is presently of the opinion that each side should bear its own costs. Consequently, it shall be ordered at this time that no costs shall be taxed. In the event the defendants wish to pursue the matter, the Court will reconsider its position in a post-judgment context, provided the defendants file a motion for reconsideration of the order regarding taxation by no later than April 3, 1989.

The Court also questions the appropriateness of expressly ordering the plaintiff, at this juncture, to pay interim payments, including past due installments, of withdrawal liability. Although plaintiff is unquestionably obligated under 29 U.S.C. 1401(d) to make interim payments[10], this Court is not satisfied that plaintiff's failure to make these payments constitutes, under

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[10] Subsection (d) of 29 U.S.C. § 1401 provides:

> Payments shall be made by an employer in accordance with the determinations made under this part [29 USCS §§ 1381 et seq.] until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 515) [29 USCS § 1145].

the particular facts of this case, the type of "failure" contemplated by 29 U.S.C. § 1451(b)[11]. On July 18, 1988, this Court granted plaintiff's motion to stay arbitration and toll the time periods for arbitration under the MPPAA pending a decision regarding plaintiff's employer status. It would thus appear that plaintiff's failure to make interim payments was authorized, whether or not erroneously, by this Court. Consequently, it is this Court's opinion that, although plaintiff is statutorily required to make interim payments of withdrawal liability, matters concerning the amount of and deadlines for those interim payments, if not resolved by the parties *sua sponte*, are due to be addressed in the first instance by the arbitrator. *See e.g., Marvin Hayes Lines, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 814 F.2d 297, 301 (6th Cir. 1987) (district court directed to enter an order awarding interim payments, interest, and such other costs and fees as are appropriate *only if* the interim payments ordered by the arbitrator are not being made). The Court, despite its intent to dismiss rather than stay this action, shall maintain jurisdiction over the parties for the limited purpose of compelling plaintiff, pursuant to 29 U.S.C. § 1451(b), to make such interim payments if the matter is not otherwise resolved by the parties or the arbitrator.

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[11] Section 1451 of Title 29 states at subsection (b):

> Failure of employer to make withdrawal liability payment within prescribed time. In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 515 [29 USCS § 1145]).

CONCLUSION

For the reasons set forth above, it is ORDERED that defendants' motion for summary judgment be and is hereby GRANTED to the extent that: (1) plaintiff Carriers Container Council, Inc. is determined to be an "employer" pursuant to the MPPAA and (2) Plaintiff Carriers Container Council, Inc. is liable under the MPPAA to the defendant Mobile Steamship Association, Inc.-International Longshoremen's Association, AFL-CIO Pension Plan and Trust for withdrawing from the plan. Plaintiff Carriers Container Council, Inc.'s cross-motion for summary judgment is accordingly DENIED.

The parties are hereby DIRECTED to proceed with the arbitration initiated by plaintiff CCC pursuant to 29 U.S.C. § 1401 for the purpose of determining the amount of Carrier Container Council, Inc.'s withdrawal liability.

It is FURTHER ORDERED that defendants request for an order staying this action pending arbitration be and is DENIED but that, in lieu thereof, plaintiff's complaint be and is hereby DISMISSED.

DONE this 21st day of March, 1989.

/s/ W.B. Hand

SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CARRIERS CONTAINER
COUNCIL, INC.,

Plaintiff,

vs.

CIVIL ACTION
NO. 88-0095-BH-C

MOBILE STEAMSHIP
ASSOCIATION, INC., et al.,

Defendants.

ORDER

This cause is before the Court on: (1) plaintiff's motion of April 12, 1989 for the Court to order an escrow arrangement for the withdrawal liability payments due from the plaintiff pursuant to 29 U.S.C. § 1401(d), and (2) defendants' motion of April 21, 1989 to compel the interim payments of withdrawal liability to the plan as opposed to an escrow account and to award the defendants interest, liquidated damages, and costs including attorney's fees.

The Court has carefully considered the aforementioned motions and the parties' respective positions relative to the propriety of an escrow arrangement. Based upon such consideration, the Court concludes that plaintiff's motion is due to be denied in its entirety while defendants' motion is due to be granted only in part.

Although the Court is unpersuaded that an escrow arrangement for withdrawal liability payments is proscribed by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. § 1381, *et seq.*,[1] the Court is equally unpersuaded that

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[1] While it is true that neither 29 U.S.C. §§ 1399(c) and 1401(d) nor the regulations promulgated under these sections expressly sanctions the payment of withdrawal liability into an escrow account, it is also evident that neither § 1399(c) nor § 1401(d) expressly directs that the withdrawal liability payments must be made to the plan. All that these sections of the MPPAA mandate is that the employer shall make the payments in accordance with the schedule

(*Footnote continued*)

such an escrow account should be sanctioned in this case. There certainly exists no statutory mandate that this Court sanction such an escrow arrangement. Plaintiff, Carriers Container Council, Inc. (CCC), here essentially argues only that the Plan might be required to reorganize pursuant to 29 U.S.C. § 1421, *et seq.*, and that, consequently, the amounts paid by CCC "might not be returned" in the event CCC ultimately prevails on appeal or in arbitration. Both aspects of CCC's argument, however, are grounded largely on speculation. The Court is particularly unpersuaded that, in the event of reorganization, 29 U.S.C. §§ 1426 and 1431 impose such financial restrictions on the Plan's assets as to prohibit the return of any overpayment to CCC pursuant to 29 U.S.C. § 1401(d) and 29 CFR § 2644.3(d).[2] Consequently, the Court concludes that plaintiff's motion is due to be denied.

As to defendants' motion to compel, the Court concludes that it is due to be granted only in part. The Court finds that the defendants are entitled to have the plaintiff compelled to make all overdue withdrawal liability payments with interest as set forth in 29 C.F.R. § 2644.3. According to subsection (a)(1) of this regulation, interest will be calculated from the due date

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established by the plan's sponsor. It is also evident that the payment of statutorily mandated interim payments of withdrawal liability into an interest-bearing escrow account will not thwart Congress' intent to mitigate "the adverse effects of non-payment of liability [such as loss of investment income] upon multiemployer plans". *Dorn's Transportation, Inc. v. I.A.M. National Pension Fund*, 578 F.Supp. 1222, 1232 (D. D.C. 1984), *aff'd*, 753 F.2d 166 (D.C. Cir. 1985). For these reasons, this Court concludes that, in the appropriate circumstances, escrow arrangements for withdrawal liability payments may be authorized. *See e.g., Korea Shipping Corp. V. New York Shipping Association*, 811 F.2d 124, 126-27 (2nd Cir. 1987); *T.I.M.E.-DC Inc. v. Management-Labor Welfare & Pension Funds*, 756 F.2d 939, 947 (2nd Cir. 1985); *Bowers v. Compania Peruana De Vapores*, 689 F. Supp. 215, 220 (S.D. N.Y. 1988).

[2] *See e.g.*, 29 U.S.C. § 1103(c)(4) which provides, in pertinent part:

> In the case of a withdrawal liability payment which has been determined to be an overpayment, paragraph (1) [which prohibits the assets of a plan to inure to the benefit of any employer] shall not prohibit the return of such payment to the employer within 6 months after the date of such determination".

of such interim withdrawal payments. Neither of the parties has presented to the Court a figure representing the present amount of overdue withdrawal liability and accrued interest. The Court, therefore, can only direct that the plaintiff comply with 29 U.S.C. §§ 1399(c) and 1401(d) by paying all overdue withdrawal liability payments plus interest as calculated under the applicable regulation.

The Court is not, however, satisfied that defendants are entitled to consider the plaintiff in default and thus to accelerate plaintiff's withdrawal liability obligation. This is so even though, upon review of the record, the Court agrees that plaintiff's obligation to make interim payments pursuant 29 U.S.C. 1401(d) was never stayed.

As the defendants have recognized, § 2644.2(c)(1) of the regulations issued by the Pension Benefit Guaranty Corporation (PBGC)[3] does not permit acceleration of the outstanding amount of withdrawal liability until after the arbitrator's decision is final. Defendants' contention that the PBGC had no authority to issue such a regulation because it is contrary to 29 U.S.C. § 1399(c)(5) ignores the fact that the statute, at the very least, does not require a plan sponsor to accelerate the withdrawal liability upon a default of any payment. It would also appear that the statute only permits acceleration of the interest due on the liability. The statute merely provides that: "[i]n the event of a default, a plan sponsor *may require* immediate payment of the *outstanding amount* of an employer's withdrawal liability, *plus accrued interest on the total outstanding liability*

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[3] The Pension Benefit Guaranty Corporation (PBGC) is a wholly-owned corporation within the United States Department of Labor. The PBGC "collects insurance premiums from covered pension plans and provides benefits to participants in those plans if their plan terminates with insufficient assets to support its guaranteed benefits". *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720, 104 S.Ct. 2709, 2713, 81 L.Ed.2d 601, 605 (1984). The PBGC is also charged with the responsibility for developing such "regulations as may be necessary to carry out the purposes of [the MPPAA]". 29 U.S.C. § 1302(b)(3).

from the date of the first payment which was not timely made." 29 U.S.C. § 1399(c)(5) (emphasis added). Consequently, the regulation limiting a plan sponsor's right to accelerate the withdrawal liability is not contrary to § 1399(c)(5).

Next at issue is defendants' right to liquidated damages and costs, including attorney's fees. Defendants contend that their counterclaim to compel payments of withdrawal liability is, under 29 U.S.C. § 1451(b), treated in the same manner as an action to compel payments of delinquent contribution under the Employee Retirement Income Security Act of 1974 (ERISA) and that, therefore, such damages and costs are mandatory pursuant to 29 U.S.C. 1132(g)(2).* It would appear that many circuit courts have held that "in successful actions for delinquent payments, 'attorney's fees are no longer discretionary'". *United Retail & Wholesale Employees Teamsters Union Local No.115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 135 (3rd Cir. 1986), *quoting*, *Operating Engineers Pension Trust v. Reed*, 726 F.2d 513, 514 (9th Cir. 1984), and *citing*, *O'Hare v. General Marine Transport Corp.*, 740 F.2d 160, 171 (2nd Cir. 1984); *Carpenters Amended and Restated Health Benefit Fund v. John W. Ryan Construction Co.*, 767 F.2d 1170 (5th Cir. 1985. *See also*, *Amalgamated Insurance Fund v. Sheldon Hall Clothing, Inc.*, 862 F.2d 1020, 1023 (3rd Cir. 1988).

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* Section 1132(g)(2) provides:

> In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 U.S.C. § 1145] in which a judgment in favor of the plan is awarded, the court *shall* award the plan –
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of –
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent . . .,
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
>
> (E) such other legal or equitable relief as the court deems appropriate.

This Court also now acknowledges that § 1132(g)(2) mandates that a plan which has prevailed on its motion, or another's brought on its behalf, to compel delinquent payments is entitled to an award of attorney's fees, costs and liquidated damages. However, § 1132(g)(2) does not mandate that this Court determine the amount of such an award by merely pulling figures out of the air. In apparent contrast to the above cited cases as well as those relied upon by the defendants in their brief filed April 21, 1989, the defendants have at no time during the course of this litigation argued or presented evidence as to: (1) the amount of accrued interest, (2) the existence, if any, of a liquidated damages provision in the plan, or (3) the costs incurred by the defendants, including attorney's fees. In point of fact, defendants made no mention of § 1132(g)(2) or "liquidated damages" until they filed their motion to compel on April 21, 1989, in apparent response to the plaintiff's motion for an escrow arrangement.

Defendants delay in presenting their present argument is particularly troubling to the Court inasmuch as they were directed, in this Court's order of March 21, 1989, to file a motion for reconsideration by April 3, 1989, if they wished to pursue their claim for costs and attorney's fees. Defendants have also failed, with specific respect to their claim for attorney's fees, to comply with Local Rule 28. Consequently, there exists no evidence in this record upon which the Court can base an award of either liquidated damages or costs, including attorney's fees. As noted above, this Court is also unable to declare the amount of interest presently due from the plaintiff to the plan.

For the reasons set forth above, it is ORDERED as follows: (1) defendants' motion to compel is hereby DENIED *except* to the extent that plaintiff is hereby DIRECTED to pay to the defendant Plan the amount of all overdue withdrawal liability payments plus interest as set forth in 29 C.F.R. 2644.3 (2) plaintiff's motion for the Court to order an escrow arrangement for the aforementioned overdue withdrawal payments is hereby DENIED.

DONE this 5th day of May, 1989.

/s/ W.B. Hand

SENIOR DISTRICT JUDGE

CARRIERS CONTAINER COUNCIL, INC.,

Plaintiff-Appellant, Cross Appellee,

v.

MOBILE STEAMSHIP ASSOC. INC.—International Longshoreman's Assoc., AFL-CIO Pension Plan and Trust, and its trustees F.D. Alspaugh, Arthur W. Stratton, Hartwell Ludlow, Ned Mattingly, Felix Cleveland, Henry L. Clarke, Albert Walton, Jr., Seymour Irby,

Defendants-Appellees, Cross Appellants.

CARRIERS CONTAINER COUNCIL, INC.,

Plaintiff-Appellee,

v.

MOBILE STEAMSHIP ASSOCIATION, INC., International Longshoreman's Assoc., AFL-CIO Pension Plan and Trust and its trustees, F.D. Alspaugh, Arthur W. Stratton, Hartwell Ludlow, Ned Mattingly, Felix Cleveland, et al.,

Defendants-Appellants.

MOBILE STEAMSHIP ASSOCIATION, MSSA-ILA Pension Plan & Welfare Plans, MSSA-ILA Local 1985 Maintenance Employees' Pension Plan, PMTA-ILA Pension Fund, PMTA-ILA Welfare Fund, PMTA-ILA Supplemental Unemployment Compensation Benefit Plan, et al.,

Plaintiffs-Appellees,

v.

CARRIER'S CONTAINER COUNCIL, INC.,

Defendant-Appellant,

International Longshoreman's Association, AFL-CIO,

Intervenor-Defendant.

Nos. 89-7279, 89-7451 and 89-7505.

United States Court of Appeals, Eleventh Circuit, June 22, 1990.

Appeals from the United States District Court for the Southern District of Alabama; William Brevard Hand and Charles R. Butler, JJ.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 22, 1990, 11th Cir., 1990, 896 F.2d 1330)

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge:

PER CURIAM:

Upon consideration of the petition for rehearing, that part of the opinion appearing in the published slip opinion on page 2200 [896 F.2d at 1340] reading: "This language from the agreement, and the parties' characterizations relied on by the district court,[18] support the conclusion that CCC funds were intended to benefit the local port plans only and should not be returned to the carriers.[19]" is stricken and the following is substituted therefor: "This language from the agreement supports the conclusion that CCC funds were intended to benefit the local port plans only and should not be returned to the carriers.[18]"

Footnote 18 in the slip opinion is stricken.

Other than the above changes, the petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

United States Court of Appeals
For the Eleventh Circuit

No. 89-7279

D.C. Docket No. 88-0095-BH

CARRIERS CONTAINER COUNCIL, INC.,

Plaintiff-Appellant, Cross-Appellee,

versus

MOBILE STEAMSHIP ASSOC. INC.—INTERNATIONAL LONGSHOREMAN'S ASSOC., AFL-CIO PENSION PLAN AND TRUST, and its trustees F.D. ALSPAUGH, ARTHUR W. STRATTON, HARTWELL LUDLOW, NED MATTINGLY, FELIX CLEVELAND, HENRY L. CLARKE, ALBERT WALTON, JR., SEYMOUR IRBY,

Defendants-Appellees, Cross-Appellants.

No. 89-7451

D.C. Docket No. 88-0095-BH-C

CARRIERS CONTAINER COUNCIL, INC.,

Plaintiff-Appellee,

versus

MOBILE STEAMSHIP ASSOCIATION, INC., INTERNATIONAL LONGSHOREMAN'S ASSOC., AFL-CIO PENSION PLAN AND TRUST and its trustees, F.D. ALSPAUGH, ARTHUR W. STRATTON, HARTWELL LUDLOW, NED MATTINGLY, FELIX CLEVELAND, et al.,

Defendants-Appellants.

No. 89-7505

D.C. Docket No. 87-0553-B

MOBILE STEAMSHIP ASSOCIATION, MSSA-ILA PENSION PLAN & WELFARE PLANS, MSSA-ILA LOCAL 1985 MAINTENANCE EMPLOYEES' PENSION PLAN, PMTA-ILA PENSION FUND, PMTA-ILA WELFARE FUND, PMTA-ILA SUPPLEMENTAL UNEMPLOYMENT COMPENSATION BENEFIT PLAN, ET AL.,

Plaintiffs-Appellees,

versus

CARRIER'S CONTAINER COUNCIL, INC.,

Defendant-Appellant,

INTERNATIONAL LONGSHOREMAN'S ASSOCIATION, AFL-CIO,

Intervenor-Defendant.

Appeals from the United States District Court
for the Southern District of Alabama

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgments of the said

District Court in these causes be and the same are hereby AFFIRMED in part and REVERSED in part, in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that each party bear their own costs on appeal.

Entered: March 22, 1990
For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: Aug 7 1990